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IN THE

# Supreme Court of the United States

October Term, 1993

DAVID RONALD CHANDLER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI


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132 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Does 21 U.S.C. § 848(k), the eighth amendment, or the due process clause of the Constitution, require that the jury, in considering whether to recommend the death penalty for a § 848 defendant, be informed of the alternative sentence the defendant will receive if it chooses not to recommend death?

2. Does 21 U.S.C. § 848(l), the eighth amendment, or the due process clause of the Constitution, require that the jury, in considering whether to recommend the death penalty for a § 848 defendant, be informed of the consequences of its failing to reach a unanimous decision either in favor of or against death?

3. Does 21 U.S.C. § 848(k), (m) or (q) require the jury to make written findings of mitigating factors during the penalty phase of the proceedings and/or does § 848(q) require an appellate court to remand the case if such written findings are not returned?

4. Does 21 U.S.C. § 848 violate the eighth amendment or the due process clause under *Stringer v. Black*, ____ U.S. ____, 112 S. Ct. 1130 (1992) by including, as an aggravating factor in the jury's weighing process, the minimum death eligibility threshold set forth in *Tyson v. Arizona*, 481 U.S. 137 (1987)—the mens rea of intent or recklessness?

5. In light of the ambiguous statutory language of § 848(e), must the judge instruct the jury that it may find the defendant guilty only if it finds a direct connection between the killing and the "continuing criminal enterprise"?

6. Does 28 U.S.C. § 455(a) require recusal for judicial bias of any kind, or does it encompass only judicial bias arising from events outside judicial proceedings?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| STATEMENT OF JURISDICTION OF THE COURT | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| I. TRIAL PROCEEDINGS | 4 |
| II. POST-TRIAL PROCEEDINGS | 5 |
| REASONS FOR GRANTING THE WRIT | 6 |
| I. THIS COURT SHOULD DETERMINE WHETHER § 848(k), THE EIGHTH AMENDMENT, OR THE DUE PROCESS CLAUSE OF THE CONSTITUTION REQUIRES THAT SENTENCING JURIES BE INFORMED OF THE ALTERNATIVE SENTENCE THE DEFENDANT WILL RECEIVE SHOULD THEY DECIDE NOT TO RECOMMEND DEATH | 7 |
| A. Section 848(k) Requires Sentencing Juries To Choose between Death and the Alternative Sentence to Death | 9 |
| B. The District Court's Failure To Instruct the Jury Concerning the Alternative Sentence Violated Mr. Chandler's Rights under the Fifth and Eighth Amendments | 11 |

Page

II. THIS COURT SHOULD GRANT MR. CHANDLER'S PETITION IN ORDER TO RESOLVE A CONFLICT CONCERNING WHETHER § 848 OR THE FIFTH OR EIGHTH AMENDMENT REQUIRES TRIAL COURTS TO ACCURATELY INFORM CAPITAL SENTENCING JURIES AS TO THE CONSEQUENCES OF A FAILURE TO REACH A UNANIMOUS DECISION . . . . . 13

III. THIS COURT SHOULD ESTABLISH, DEFINITIVELY, WHETHER 21 U.S.C. § 848(k) AND (m) REQUIRE THE JURY TO MAKE WRITTEN FINDINGS OF MITIGATING FACTORS DURING THE PENALTY PHASE OF A TRIAL AND WHETHER § 848(q) MANDATES A REMAND WHERE THE JURY DOES NOT RETURN SUCH WRITTEN FINDINGS . . . . . 16

A. Section 848(q) Requires the Appellate Court to Remand the Case Where the Jury Does Not Return Written Findings of Mitigating Factors . . . . 17

B. The Appellate Court Erred in Ruling that § 848(k) Merely Provides the Jury with the "Option" of Returning Written Mitigating Factor Findings . . . . . 18

C. The Eleventh Circuit's Statement that Defendant Waived these Arguments Is Not a Bar to this Court's Review . . . . . 21

IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONALITY OF SECTION 848'S USE OF THE MINIMUM THRESHOLD DEATH ELIGIBILITY REQUIREMENT OF *TISON V. ARIZONA* AS AN AGGRAVATING FACTOR . . . . . 24

Page

V. SIGNIFICANT QUESTIONS ARE RAISED BY SECTION 848'S AMBIGUOUS DEFINITION OF THE OFFENSE AND THE TRIAL COURT'S FAILURE TO CLARIFY THAT AMBIGUITY IN ITS JURY INSTRUCTIONS ..... 26

VI. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE ELEVENTH CIRCUIT'S OVERLY RESTRICTIVE INTERPRETATION OF 28 U.S.C. § 455(a) ..... 30

CONCLUSION ..... 31

## TABLE OF AUTHORITIES


| Cases | Page(s) |
|---|---|
| *Allen v. United States*, 164 U.S. 492 (1896) | 13 |
| *Arave v. Creech*, ___ U.S. ___, 113 S. Ct. 1534 (1993) | 25 |
| *Beck v. Alabama*, 447 U.S. 625 (1980) | 12 |
| *California v. Ramos*, 463 U.S. 992 (1983) | 12 |
| *Chapman v. California*, 386 U.S. 18 (1967) | 14 |
| *Clemons v. Mississippi*, 494 U.S. 738 (1990) | 18, 25 |
| *Enmund v. Florida*, 458 U.S. 782 (1982) | 24 |
| *Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990) | 15 |
| *Feguer v. United States*, 302 F. 2d 214 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (1962) | 3 |
| *Gaskins v. McKellar*, 916 F.2d 941 (4th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2277 (1991) | 15 |
| *Godfrey v. Georgia*, 446 U.S. 420 (1980) | 24 |
| *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989), *cert. denied*, 493 U.S. 874 (1989) | 15 |
| *Liteky v. United States*, 973 F.2d 910 (11th Cir. 1992) *cert. granted*, __ U.S. __, 113 S. Ct. 2412 (1993) | 6, 30 |
| *Lockett v. Ohio*, 438 U.S. 586 (1978) | 12 |
| *Lowenfield v. Phelps*, 484 U.S. 231 (1988) | 15, 25 |

| | Page(s) |
|---|---|
| *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1363 (1993) | 15 |
| *Maynard v. Cartwright*, 446 U.S. 356 (1980) | 25 |
| *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) | 9 |
| *Simmons v. South Carolina*, ___ U.S. ___, 114 S. Ct. 57 (1993) | 7, 12 |
| *Skipper v. South Carolina*, 476 U.S. 1 (1986) | 12 |
| *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130 (1992) | 3, 18, 24, 25, 26 |
| *Tison v. Arizona*, 481 U.S. 137 (1987) | 3, 24 |
| *United States v. Carll*, 105 U.S. 611 (1881) | 28 |
| *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990) | 3, 23 |
| *United States v. McCall*, 915 F.2d 811 (2d Cir. 1990) | 23 |
| *United States v. Olano*, ___ U.S. ___, 113 S. Ct. 1770 (1993) | 22 |
| *United States v. Taylor*, 868 F.2d 125 (5th Cir. 1989) | 23 |
| *United States v. Whiting*, 771 F. Supp. 476 (D. Mass. 1991) | 27 |


**U.S. Constitution**


| | |
|---|---|
| U.S. CONST. Amend. VIII | 2 |
| U.S. CONST. Amend. V | 2 |

| | Page(s) |
|---|---|
| U.S. CONST. Art. I § 8, cl. 3 | 2 |
| **Statutes and Rules** | |
| 21 U.S.C. § 848 | *passim* |
| 28 U.S.C. § 1254(1) | 2 |
| Fed. R. Crim. P. 52 | 17, 22 |
| **Administrative and Legislative Materials** | |
| 134 Cong. Rec. S16001 (daily ed. Oct. 14, 1988) | 11 |
| 134 Cong. Rec. S16042 (daily ed. Oct. 14, 1988) | 10 |
| 134 Cong. Rec. S16187 (daily ed. Oct. 14, 1988) | 10, 11 |
| 134 Cong. Rec. S7416 (daily ed. June 8, 1988). | 27 |
| 134 Cong. Rec. S7483 (daily ed. June 9, 1988). | 10 |
| 134 Cong. Rec. S7489 (daily ed. June 9, 1988). | 10 |
| Federal Sentencing Guidelines Manual Section 2A1.1 (1990 ed.) | 7 |
| S. 2455, 100th Cong., 2d Sess. § 1(k) (1988) | 10 |
| **Law Reviews** | |
| William J. Bowers, *Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 Law & Soc. Rev. 157 (1993) | 9 |

Page(s)

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Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (1987) . . . . . 9

**Unreported Case Materials**

*United States v. Cooper*, No. 89-CR-580 (N.D. Ill. Special Findings filed Mar. 20, 1991) . . . . . 8, 14, 16

*United States v. Garza*, Cr. No. B-93-009 S.D. Tex. Special Findings filed July 31, 1993) . . . . . 8, 14, 16

*United States v. Hutching*, No. CR-92-32-S (E.D. Okla. Special Findings filed Mar. 17, 1993) . . . . . 8, 14, 16

*United States v. Pitera*, No. 90-CR-424 (E.D.N.Y. Special Findings filed Jul. 6, 1992) . . . . . 8, 14, 16

Page(s)

*United States v. Tipton*, No. 3:92 CR68 (E.D. Va. Special Findings filed Feb. 16, 1993) . . . . . 8, 14, 16

*United States v. Villarreal*, No. 9:91 CR4 (E.D. Tex. Special Findings filed Jul. 1, 1991) . . . . . 8, 14, 16

**Miscellaneous**

*Black's Law Dictionary 1596*, (6th ed. 1990) . . . . . 28

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

DAVID RONALD CHANDLER respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 996 F.2d 1073 (11th Cir. 1993) (as modified on Sept. 30, 1993) and is reprinted in the Appendix ("App.") to this petition at A1-A55. The order of the Court of Appeals granting the government's motion for modification of the panel's opinion is reprinted at App. A56. The order of the Court of Appeals denying petitioner's motion for rehearing and suggestion of rehearing en banc is reprinted at App. A57-A58. The judgment of the United States District Court for the Northern District of Alabama as to count 3 of the indictment is reprinted

at App. A59-A60. The judgment of the District Court as to counts 1, 2 and 4-9 is reprinted at App. A61-A65. The order of the District Court denying Mr. Chandler's new trial motions as to both phases of the trial is reprinted at App. A66-A69.

## STATEMENT OF JURISDICTION OF THE COURT

The judgment of the Eleventh Circuit was entered on July 1, 1993. A timely petition for rehearing and suggestion for rehearing en banc was denied on September 30, 1993. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a number of provisions within 21 U.S.C. § 848, the entirety of which is reprinted at App. A70-A83.

In addition, this case involves the following constitutional provisions:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. CONST. Amend. VIII.

> No person shall . . . be deprived of life, liberty or property without due process of the law.

U.S. CONST. Amend. V.

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

U.S. CONST. art. I, § 8, cl. 3.

## STATEMENT OF THE CASE

Mr. Chandler is the first person in the country to be sentenced to death under the recently enacted federal death penalty laws set

forth in 21 U.S.C. § 848.[1] At the time of Petitioner's trial, these death penalty provisions had been employed only once before, in *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990). These provisions, enacted in November 1988, were directed toward intentional or reckless killings which occur in connection with an ongoing drug trafficking enterprise.

The Eleventh Circuit's sweeping opinion in this case, the first appellate opinion construing the statute's death penalty provisions, adopts interpretations of key statutory and constitutional issues that are both wrong and in conflict with the interpretations reached in many other cases.[2] The court of appeals held, contrary to the statutory language, that trial judges may require federal capital juries to return death penalty recommendations while remaining ignorant of the sentencing alternative—in this case, life without parole. Adopting a reading of the statute neither supported by its plain language nor advanced by either party, the court of appeals also concluded that § 848 prescribes an unprecedented procedure by which the judge must provide sentencing juries with the "option" of returning written findings of mitigating factors—the jury may then decide, at its whim, whether to fill out this section of the verdict form or not. Further, in contravention of this Court's holding in *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130 (1992), the court of appeals upheld § 848's improper insertion of *Tison v. Arizona*, 481 U.S. 137 (1987) intent/recklessness findings into the jury's death penalty weighing process as statutory aggravating factors. For these and other reasons, this case warrants immediate review by this Court.

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[1] The last time a civilian was executed for a federal offense occurred over thirty years ago, in 1962. *See Feguer v. United States*, 302 F.2d 214 (8th Cir. 1962), *cert. denied*, 371 U.S. 872 (1962).

[2] Since the enactment of section 848(e) in 1988, a total of seven prosecutions against fourteen defendants have reached death penalty hearings. *See* David Bruck, Federal Death Penalty Prosecutions, 1988-93, reprinted at App. A84-A88. An additional seven cases involving eleven defendants are currently pending under § 848(e). *Id.*

## I. TRIAL PROCEEDINGS.

This case arises out of the killing of Marlin Shuler by Charles Ray Jarrell, Sr. and the government's attempt to link his death to Mr. Chandler's marijuana trafficking. Mr. Chandler's conviction was based solely on Jarrell's testimony that Mr. Chandler offered him $500 to kill Shuler. (RVI-222)[3] Prior to the trial, petitioner moved for the judge's recusal based on the judge's statement, in a pretrial order, that "Jarrell was an alcoholic lackey for Chandler who for $500, or maybe simply a fifth of liquor, likely would have done anything Chandler directed him to do." (R1-201) This motion was denied.

At the trial, Jarrell testified that, on May 8, 1990, he and Shuler each drank approximately twenty-three beers (RVII-23) and then took turns shooting at various targets, during which time Jarrell shot Shuler. (RVII-15-24) Jarrell never received any money from Mr. Chandler. (RVII-11-12) Jarrell received complete immunity from the murder charges both for himself and for his son, who was charged in state court with conspiracy to commit murder. (RXI-115-18, 123-28)

The parties presented the jury with conflicting evidence concerning why Shuler was killed. The evidence at trial established that Shuler was an alcoholic who over a period of years repeatedly battered his wife, Donna Shuler—who is Jarrell's sister. (RVI-185-86) (*E.g.*, RVI-241-42; RVII-45-46; RXI-154) Approximately five months before Jarrell actually killed Shuler, Jarrell had attempted to kill Shuler because of his continuing abuse of Donna Shuler. (RVII-40-46; RXI-109-12, 126-27)

Despite the evidence that Jarrell intended to kill Shuler for reasons that had nothing to do with Mr. Chandler, the prosecution contended that Mr. Chandler solicited Shuler's death because Shuler had provided the police with information leading to Donna Shuler's arrest for marijuana trafficking, (RX-125-29) and alleged that Donna Shuler was a member of Mr. Chandler's marijuana

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[3] Citations to the record in the trial court are to volume and page number of the record and are designated as "R" "vol. no." "page no.".

conspiracy. (RVII-63-64; RXI-156-157). Despite the conflicting motivations presented to the jury, the judge's instructions at the guilt phase were ambiguous as to whether the substantive offense of § 848(e) required a purposeful relationship between the killing and the continuing criminal enterprise or merely temporal simultaneity. (RXIII-187) The jury found Mr. Chandler guilty of the substantive offense. (RII-218-19)

At the trial and sentencing hearing, the government attempted to portray Mr. Chandler as a multiple murderer by presenting evidence concerning the disappearance of two individuals, Patrick Burrows and Jeffrey McFry. (RXIII-116; RVII-122-23, 137, 151-52; RX-48-49) Although the prosecution acknowledged that it could not prove these individuals were dead and that Mr. Chandler was not charged with their deaths, (RVI-19) it, nevertheless, argued to the jury that Mr. Chandler deserved the death penalty because he had killed them (RXV-68-69).

At the penalty phase, Mr. Chandler and the government stipulated that Mr. Chandler had no prior convictions on any felony or drug charge and that the state murder charges against Jarrell and his son in connection with the Shuler murder had been dismissed. (RXV-62, 72-73) The judge instructed the jury to return a unanimous recommendation either for or against the death penalty. (RXV-91) The court did not inform the jury of the alternative penalty Mr. Chandler would receive should it decide not to recommend death. Nor did it inform the jury of the consequences should it fail to achieve unanimity. (RII-221) Finally, the judge did not include any space on the verdict form for the jury to return findings of mitigating factors. (RII-221)

The jury found as aggravating factors that Mr. Chandler intentionally caused the death of Shuler and that he had procured the murder by promising the payment of money. (RXV-97-98) It then recommended that Mr. Chandler be sentenced to death. (RXV-99; RII-221))

## II. POST-TRIAL PROCEEDINGS.

Mr. Chandler moved for a new trial and death penalty hearing on numerous grounds. The trial court held summarily that all but

one of the points "either raise matters which have earlier been argued to and rejected by the court or raise matters which have no merit and the reasons for rejecting them are self evident." App. A66.

Mr. Chandler appealed both his conviction and his sentence to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit denied Mr. Chandler's appeal for a new trial or a new death penalty hearing on all grounds. Op. at App. A1-A55. A timely motion for rehearing was summarily denied. App. A57-A58.

## REASONS FOR GRANTING THE WRIT

This case presents five important questions concerning § 848 for this Court's review.[4] Every trial court presiding over a sentencing hearing under § 848(e) must address all five of these questions. Courts have already split on a number of them. The intervention of this Court is, therefore, needed now to secure the uniform administration of the law.

This is not a state habeas corpus appeal implicating the concerns of comity and federalism. Rather, is the direct appeal of the first death sentence ever to be handed down under § 848—a statute that falls solely under the province of the federal judiciary. This Court bears ultimate responsibility for the sound administration of federal death penalty laws and, accordingly, should grant Mr. Chandler's petition before numerous resentencing hearings become necessary and, more importantly, before Mr. Chandler is illegally executed simply because his case preceded the development of an inter-circuit conflict.

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[4] In addition, this petition raises, in Part VI, an important interpretational question concerning whether the federal recusal provision set forth in 28 U.S.C. § 455(a) requires recusal for any kind of bias, or only for bias arising from extrajudicial circumstances. This Court has granted certiorari in *Liteky v. United States*, _____ U.S. ____, 113 S.Ct. 2412 (1993) to address this identical issue and should, therefore, grant certiorari or hold this case pending the outcome of *Liteky*.

## I. THIS COURT SHOULD DETERMINE WHETHER § 848(k), THE EIGHTH AMENDMENT, OR THE DUE PROCESS CLAUSE OF THE CONSTITUTION REQUIRES THAT SENTENCING JURIES BE INFORMED OF THE ALTERNATIVE SENTENCE THE DEFENDANT WILL RECEIVE SHOULD THEY DECIDE NOT TO RECOMMEND DEATH.[5]

Section 848(k) provides that, once the jury makes certain threshold findings of statutory aggravating factors, it must weigh aggravating and mitigating factors to decide whether to recommend "that a sentence of death shall be imposed *rather than a sentence of life imprisonment without possibility of release or some other lesser sentence*". 21 U.S.C. § 848(k) (emphasis supplied). This statutory provision expressly requires the jury to recommend death only if it concludes that death is preferable to an alternative sentence.

The district court in this case, however, failed to instruct Mr. Chandler's sentencing jury that his alternative sentence would be life without parole.[6] (RXV-19-20) Not only did the district court fail to provide the jury with any information concerning Mr. Chandler's alternative sentence, but it three times instructed the jury that it should not "be concerned with the question of what sentence the defendant might receive in the event you

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[5] This Court has granted certiorari in *Simmons v. South Carolina*, ___ U.S. ___, 114 S. Ct. 57 (1993) to decide whether the eighth amendment and due process clause require accurate alternative sentencing instructions in capital cases. Because of the related issues in *Simmons*, which concerns whether the trial court may withhold information concerning eligibility for parole, and this case, which concerns whether the trial court may completely withhold alternative sentencing information, the Court should either grant certiorari or hold this case pending the outcome of *Simmons*.

[6] *See* Federal Sentencing Guidelines Manual Section 2A1.1 (1990 ed.) (life without parole is the minimum sentence allowable for the substantive offense of which Mr. Chandler was convicted).

determine not to recommend a death sentence".(RXV-85; *see also* RXV 20, 87)[7]

The Eleventh Circuit upheld this procedure, stating: "[n]othing in Section 848 requires the jury to be informed of what sentence the defendant might receive in the absence of death." Op. at App. A14. This construction of § 848(k) conflicts with the plain language of § 848(k), with its legislative history, and with the interpretation of that section by three other district courts.[8] In addition, the failure of the district court to inform the jury of the alternative sentence violates Mr. Chandler's rights under the

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[7] Defense counsel submitted a proposed instruction which would have informed the jury of the life option. (Defendant's Requested Instruction No. A-12 (RII-220)) After the jury charge, counsel objected to the court's failure to give his proposed instructions (RXV-93-94).

[8] In *United States v. Pitera* and *United States v. Tipton* the district courts instructed the jury that the defendant would receive a life sentence without possibility of release if the jury recommended against the death penalty and instructed the jury to consider that fact as a mitigating circumstance. *See United States v. Pitera*, No. 90-CR-424, Penalty Phase Jury Instructions, Special Findings (E.D.N.Y. Special Findings filed Jul. 6, 1992); *United States v. Tipton*, No. 3:92CR68 Trial Transcript at 3978, Special Findings (E.D. Va. Special Findings filed Feb. 16, 1993). In *United States v. Cooper*, the Court informed the jury that the defendant faced a presumptive sentence of life without parole if not sentenced to death. *United States v. Cooper*, No. 89-CR-580 (N.D. Ill. Sentencing Hearing Jury Instructions filed Mar. 20, 1991).

Moreover, Mr. Chandler is the *only* defendant, in all seven cases to reach death penalty hearings, who has been sentenced to death by a jury that deliberated in complete ignorance of the alternative sentence. In the remaining cases, the jury either heard unopposed evidence as to the alternative sentence, *see United States v. Garza*, Cr. No. B-93-009 (S.D. Tex. Special Findings filed Jul. 31, 1993), found the alternative sentence of life without the possibility of release to be a mitigating factor, *see United States v. Hutching*, No. CR-92-32-S, Special Findings with respect to defendants Hutching, Molina and McCullah (E.D. Okla. Special Findings filed Mar. 17, 1993, Mar. 19, 1993 and Mar. 21, 1993), or failed to find two aggravating factors and, thus, did not reach this stage in the analysis. *See United States v. Villarreal*, No. 9:91CR4 (E.D. Tex. Special Findings filed Jul. 1, 1991).

Petitioner will lodge copies of the relevant portions of cited unpublished case materials with the Court.

due process clause and the eighth amendment. Finally, this erroneous jury charge is of particular concern in light of the wealth of empirical data indicating that jurors fear the early release of capital offenders and that this fear is a powerful factor weighing in favor of recommendations of death.[9]

### A. Section 848(k) Requires Sentencing Juries To Choose between Death and the Alternative Sentence to Death.

The plain language of subsection (k) requires the jury to choose between death and the alternative sentence to death. Section 848(k) directs the jury to find and weigh aggravating and mitigating factors. The statute then explicitly states:

> "Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed *rather than a sentence of life imprisonment without possibility of release or some other lesser sentence*."

21 U.S.C. §848(k) (emphasis supplied).

The Eleventh Circuit's construction of § 848 simply ignores the established principle that "[i]n construing a statute we are obligated to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The

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[9] *See* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (Nov. 1993); William J. Bowers, *Capital Punishment & Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 Law & Soc. Rev. 157, 169-70 (1993); James A. Fox, Michael L. Radelet & Julie L. Bonsteel, *Death Penalty Opinion in the Post Furman Years*, 18 N.Y.U. Rev. L. & Soc. Change 499, 513-515 n. 63-64 & 66, 525 (1990-91); Marshall Dayan, Robert S. Mahler & M. Gordon Widenhouse, Jr., *Searching for an Impartial Sentencer Through Jury Selection in Capital Trials*, 23 Loy. L.A. Rev. 151, 166-171 (1989); Anthony Paduano & Clive A. Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 222-23 (1987). In the studies cited above, however, the juries received some alternative sentencing information. The fear of release was probably much greater for jurors serving in Mr. Chandler's case because death was the only sentence which the jury could choose with any certainty.

Eleventh Circuit's holding treats the above quoted sentence as though it merely directs the jury to determine whether "a sentence of death shall be imposed". This deprives the second part of the sentence of any meaning and thereby violates established principles of statutory interpretation. The inclusion of the language "rather than a sentence of life imprisonment without possibility of release or some other lesser sentence" clearly directs the sentencer to make a relative choice in recommending death.

This is made unmistakably clear by the legislative history of subsection (k). As initially introduced in the Senate, the subsection, that would eventually become 21 U.S.C. § 848(k), required the jury to simply return a "finding as to whether a sentence of death is justified". S. 2455, 100th Cong., 2d Sess. § 1(k) (1988), reprinted at App. A89.

That legislative proposal, which is consistent with the Eleventh Circuit's holding, was decisively rejected by Congress. Congress deleted the language which merely asks whether a sentence of death "is justified" and substituted the phrase "rather than a sentence of life imprisonment without possibility of release or some other lesser sentence". 134 Cong. Rec. S16187 (daily ed. Oct. 14, 1988). During floor debates on June 9, 1988, Senator Levin had criticized the bill's earlier use of the term "justified", pointing out that the bill as drafted

> "tilts the balance towards the death penalty, because it is very possible that a death penalty could be justified in the eyes of all of the jurors but those same jurors could say that a life sentence without parole is also justified."

134 Cong. Rec. S7489 (daily ed. June 9, 1988). He remarked that under the bill jurors "are not asked which sentence they prefer". *Id.* at S7483. Arguing that he had never seen another death penalty statute drafted in that fashion, Senator Levin recommended that the bill be modified. *Id.* at S7489.

Subsequently, Senator D'Amato announced to the Senate that he had accepted Senator Levin's position, 134 Cong. Rec. S16042 (daily ed. Oct. 14, 1988), and subsection (k) was amended to its

present form. 134 Cong. Rec. S16187 (daily ed. Oct. 14, 1988). Senator Levin claimed credit for the amendment and explained that the amended statute requires a choice between alternatives:

> "From our own common experiences, we can see that there is a difference between justify and recommend. Take, for example, someone takes their pet to a veterinarian and is told that the animal is very sick. The vet might say that it would be justified to put the animal to sleep. But the vet might also say that it would be justified to utilize some medical intervention to keep the animal alive for another 6 months. Many pet owners would then ask, 'But doctor, what do you recommend?' Justify is a much broader concept than recommend and legislation which imposes a penalty as severe as the death penalty should recognize that important distinction. That is why two amendments in the package change this to require the jury to recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without a possibility of release or some other lesser sentence."

134 Cong. Rec. S16001 (daily ed. Oct 14, 1988). The purpose of the amendment, according to its sponsor, was to force the sentencer to choose between death and the alternatives to death.

This legislative history leaves no doubt that Congress meant what it said in 848(k): a capital sentencing jury in recommending death must find that death is preferable to life without parole or some other lesser sentence, and its deliberations may not be artificially channeled to a recommendation of death.

### B. The District Court's Failure To Instruct the Jury Concerning the Alternative Sentence Violated Mr. Chandler's Rights under the Fifth and Eighth Amendments.

The district court's instructions to the jury essentially required it to make a choice between death and some unknown sentence which would lie in the judge's discretion. The failure of the judge to provide a choice between known alternatives, therefore raises

two constitutional issues that were improperly addressed by the Eleventh Circuit.

First, the jury's unwarranted fear of the defendant's early release may have acted as an arbitrary factor in the sentencing process—needlessly pressuring the jurors to impose the death penalty in violation of the eighth amendment.[10] Second, the failure to provide this alternative sentencing information violated the fifth and eighth amendments by effectively preventing Mr. Chandler from presenting mitigating evidence concerning his lack of dangerousness.[11]

The district's court instructions gave the jurors a Hobson's choice of either imposing death—the ultimate penalty and in this case the *only* penalty which the jury could impose—or deferring to the district court's sentencing discretion—an option which, as far as the jury knew, included the possibility of the defendant's early release.

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[10] *See Simmons v. South Carolina*, ___ U.S. ___, 114 S. Ct. 57 (1993) (granting certiorari on question of whether fifth or eighth amendment was violated by trial court's failure to disclose to jury that alternative sentence of life imprisonment means *life without parole*); *Beck v. Alabama*, 447 U.S. 625 (1980) (statute precluding juries from returning convictions for lesser included offenses in capital cases violated eighth amendment).

[11] *See Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986), (alternative sentencing information may constitute mitigating evidence "in the sense that [it] might serve 'as a basis for a sentence less than death'"), *quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). *Cf. California v. Ramos*, 463 U.S. 992, 1008 and n.22 (1983) (information concerning parole is relevant to the issue of potential dangerousness).

## II. THIS COURT SHOULD GRANT MR. CHANDLER'S PETITION IN ORDER TO RESOLVE A CONFLICT CONCERNING WHETHER § 848 OR THE FIFTH OR EIGHTH AMENDMENT REQUIRES TRIAL COURTS TO ACCURATELY INFORM CAPITAL SENTENCING JURIES AS TO THE CONSEQUENCES OF A FAILURE TO REACH A UNANIMOUS DECISION.

Under the statutory regime of § 848, any juror, who believes that the death penalty is unwarranted in a particular case, may prevent the imposition of that penalty by refusing to vote in favor of a death recommendation.[12] Despite the obvious intent of § 848 to allow the death penalty to be imposed only upon the unanimous recommendation of all jurors, the district court failed to instruct the jury concerning the consequences of a failure to reach unanimity. Indeed, the district court's verdict form and jury charge potentially mislead the jury by requiring a unanimous recommendation either *for or against* a sentence of death. (Special Findings, RII-22; RXV-91) The charge further impelled unanimity through the inclusion of an *Allen* charge in the initial instructions.[13]

The Eleventh Circuit upheld both the charge and verdict forms. The appellate court recognized that § 848(l) precludes the district court from holding a new sentencing hearing or imposing a sentence of death in the event the sentencing jury fails to reach a unanimous recommendation. Op. at App. A18. Yet, it went on to hold that some presumed "general interest . . . in unanimous

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[12] Section 848 (k) provides that a jury's recommendation of a death sentence must be "by unanimous vote". Section 848(l) then requires the imposition of a non-death sentence in the event the jury fails to reach a unanimous recommendation:

> "Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence other than death, authorized by law."

21 U.S.C. § 848(l).

[13] (RXV-87) *See Allen v. United States*, 164 U.S. 492 (1896).

verdicts" justified withholding from the jury an instruction which would have made clear the mandates of § 848(l)—that a person may not be executed if any juror opposes the death sentence. Op. at App. A20-A21.[14] The Eleventh Circuit's interpretation simply does not comport with the statutory requirements of § 848 (k) and (l).

Further, it conflicts with the procedure implemented by all of the other district courts which have held death penalty hearings under Section 848(e). In *United States v. Tipton*, No. 3:92CR68, Instruction No. 5 (E.D. Va.), for instance, the United States District Court for the Eastern District of Virginia explained:

> "In short, if you find, after thorough deliberation, that you are *not* unanimous in your views, you have nevertheless reached a decision—namely, that the government has not met its burden of proof as to the death penalty."

*See Tipton* Jury Charge at 21-21, 34-35.[15]

Finally, even if § 848, itself, does not entitle Mr. Chandler to an instruction concerning the consequences of a single juror's vote against death, the question arises as to whether the fifth and eighth amendments do. Although this Court has approved jury

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[14] The Court went on to make the unsupported suggestion that the error was harmless, Op. at App. A21, without even considering whether the prosecution had met its burden of establishing harmlessness beyond a reasonable doubt as required by *Chapman v. California*, 386 U.S. 18, 24 (1967)—an effort which the prosecution did not even attempt below. *See* Appellee's Brief at 44-48.

[15] *See also, United States v. Cooper*, No. 89-CR-580 (N.D. Ill. Jury Instructions filed Mar. 20, 1991) (prosecution expressly sought, and court gave, the instruction which Mr. Chandler requested); *Id.* (Special Findings, Decision Form C, filed Mar. 15, 1991) (allowing jury to return nonunanimous verdict); *Pitera*, No. 90-CR-424 (E.D.N.Y. Special Findings, Decision Form C, filed Jul. 6, 1992); *Villarreal*, No. 9:91CR4(02) (E.D. Tex. Special Findings, Decision Form A, filed Jul. 1, 1991); *Garza*, Cr. No. B-93-009 (S.D. Tex. Special Findings filed Jul. 31, 1993) (jury asked to answer "yes" or "no" to question of whether they unanimously recommend a death sentence); *Hutching*, No. CR-92-32-S (E.D. Okla. Special Findings, Decision Form C, filed Mar. 17, 1993).

instructions to continue deliberating in the context of capital sentencing hearings, *Lowenfield v. Phelps*, 484 U.S. 231 (1988), it has never addressed the question of whether the interest in unanimity justifies *misinforming* the sentencing jury as to the consequences of their failing to reach a unanimous recommendation. As noted above, the Eleventh Circuit's holding departs from the procedures implemented by the other district courts that have presided over § 848 death penalty prosecutions. Further, even in their review of state cases, the Federal Circuit Courts are divided on the question of whether misleading or ambiguous unanimity charges violate the due process clause or the eighth amendment by introducing arbitrariness into the sentencing process, fostering jury unanimity through confusion.[16] This Court should, therefore, grant certiorari to resolve these issues which implicate both the statutory interpretation of § 848 and the constitutional implementation of death penalty statutes overall.

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[16] *See Kubat v. Thieret*, 867 F.2d 351, 373 (7th Cir. 1989) (reversing a death sentence because the "jurors were never expressly informed in plain and simple language that if even one juror believed that the death penalty should not be imposed, Robert Kubat would not be sentenced to death"), *cert. denied*, 493 U.S. 874 (1989); *Gaskins v. McKellar*, 916 F.2d 941, 955 (4th Cir. 1990), *cert. denied*, __ U.S. __, 111 S. Ct. 2277 (1991) (concluding that a charge erroneously requiring unanimity for or against the death penalty did not affect the jury's decision). *Cf. Mak v. Blodgett*, 970 F.2d 614, 625 (9th Cir. 1992) (affirming grant of habeas petition where a portion of the jury charge required that jurors unanimously vote against death); *cert. denied*, __ U.S. __, 113 S. Ct. 1363 (1993); *Evans v. Thompson*, 881 F.2d 117, 124 (4th Cir. 1989), *cert. denied*, 497 U.S. 1010 (1990) (in dictum stating that unanimity instructions are proper, while noting that the trial court had explained the consequences of a failure to reach a unanimous recommendation).

## III. THIS COURT SHOULD ESTABLISH, DEFINITIVELY, WHETHER 21 U.S.C. § 848(k) AND (m) REQUIRE THE JURY TO MAKE WRITTEN FINDINGS OF MITIGATING FACTORS DURING THE PENALTY PHASE OF A TRIAL AND WHETHER § 848(q) MANDATES A REMAND WHERE THE JURY DOES NOT RETURN SUCH WRITTEN FINDINGS .

Contrary to both the express statutory directive of § 848 (k), and to the procedure implemented by every other court which has held a § 848 death penalty hearing,[17] the trial court here failed to include a section on the verdict form for the jury to return findings of the relevant mitigating factors. The Eleventh Circuit, in upholding this defective procedure, made two significant errors.

First, it ignored the express statutory directive set forth in § 848(q). Subsection (q) provides:

> "The [appellate] court shall affirm the sentence if it determines that . . . (B) the information supports the special finding of every aggravating factor upon which the sentence was based, together with, *or the failure to find, any mitigating factors* as set forth or allowed by this section.
>
> "In all other cases the court shall remand the case for reconsideration under this section". (Emphasis supplied)

Section 848(q) mandates appellate review of written findings of aggravating and mitigating factors and requires a remand in the absence of such findings.

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[17] All six other trial courts included a section for written findings of mitigating factors on the verdict form. *See United States v. Cooper*, No. 89-CR-580 (N.D. Ill. Special Findings filed Mar. 20, 1991); *United States v. Garza*, Cr. No. B-93-009 (S.D. Tex. Special Findings filed July 31, 1993), *United States v. Hutching*, No. CR-92-32-S (E.D. Okla. Special Findings filed Mar. 17, 1993); *United States v. Pitera*, No. 90-CR-424 (E.D.N.Y. Special Findings filed Jul. 6, 1992); *United States v. Tipton*, No. 3:92CR68 (E.D. Va. Special Findings filed Feb. 16, 1993); *United States v Villarreal*, No. 9:91CR4 (E.D. Tex. Special Findings filed Jul. 1, 1991).

Second, adopting a bizarre interpretation of § 848, not advanced by either party, the Eleventh Circuit held that § 848(k) merely requires the judge to give the jury the "option" of returning written mitigating factor findings but does not require that such findings be made. This Court should grant certiorari to correct these statutory errors.

### A. Section 848(q) Requires the Appellate Court to Remand the Case Where the Jury Does Not Return Written Findings of Mitigating Factors.

The Eleventh Circuit erroneously ruled that "there is nothing in [subsection (q)] altering our ordinary standards of review". Op. at App. A9. It then held under § 848(k) that the statute does not require written findings of mitigating factors, but merely gives the jury the "option" of making such findings. Op. at App. A15. It further ruled that § 848(q) is only implicated if the jury decides to exercise this option. Op. at App. A16. Finally it held that the failure of the trial court to provide the jury with this option was plain error, Op. at App. A17, but did not justify a remand under Fed. R. Crim. P. 52 because of its conclusion that the error would not have changed the outcome of the sentencing hearing. Op. at App. A18.

The strictures of Rule 52, however, are simply irrelevant where, as here, Congress has mandated a specific level of appellate review. Section 848(q) affirmatively requires that the appellate court independently review the information underlying each finding of an aggravating factor and each failure to find a mitigating factor to determine whether it is supported by the information presented at the sentencing hearing. The statute's affirmative requirements mandating appellate review are not made contingent upon defendant's objections at the trial level.

Section 848(q) requires that the case be remanded where the appellate court cannot determine that the information supports every finding of an aggravating factor and every failure to find a mitigating factor. Where no mitigating factor findings are returned by the jury, the appellate court cannot determine what mitigating factors were or were not found, and certainly cannot

ascertain whether any failure to find such factors was supported by the record.

Section 848(q) does not authorize independent reweighing or plain error analysis by the appellate court. Where the trial court's findings are incomplete, it requires a remand. To this extent the statutory level of appellate protection provided in § 848 is more comprehensive than the level of appellate protection generally afforded by the eighth amendment, the due process clause, and Rule 52.[18] Congress' express decision to require appellate courts to perform a specifically mandated appellate review in § 848 should be respected by the courts, not eviscerated by resort to the doctrine of plain error embodied in Rule 52.

### B. The Appellate Court Erred in Ruling that § 848(k) Merely Provides the Jury with the "Option" of Returning Written Mitigating Factor Findings.

Section 848(k), entitled "Return of findings", provides, in relevant part:

> "The jury . . . shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If [two or more statutory aggravating factors are] found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur

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[18] The eighth amendment and due process clause require, at minimum, appellate reweighing or harmless error analysis. *See Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130, 1137 (1992) (where a defect in findings of aggravating or mitigating factors is present, baseline level of constitutional protection requires "harmless-error analysis" or "reweighing" of factors by the appellate court); *Clemons v. Mississippi*, 494 U.S. 738 (1990) (appellate reweighing only appropriate where circumstances of case would not render such reweighing "extremely speculative or impossible").

that the factor has been established. A finding with respect to any aggravating factor must be unanimous."

The defense argued that § 848(k) requires written findings of mitigating, as well as aggravating factors. The prosecution argued, conversely, that this section only requires written findings of aggravating factors, but not of mitigating factors. The Eleventh Circuit, adopting an interpretation that was not advanced by either party, and which is at odds with both the statute and the position of all other courts to deal with the issue, *see supra* n.17, held that "[s]ection 848 requires that the jury be instructed that it has the option to return written findings of mitigating factors if it so chooses, but that it does not require the return of such findings". Op. at App. A16.

Despite the considerable diversity of capital sentencing schemes, no state follows the procedure contemplated by the panel opinion. Nor, to the knowledge of defense counsel, do federal courts permit juries to decide whether to complete jury interrogatories in any other circumstance.[19]

The Eleventh Circuit's erroneous ruling on this issue is based on a flawed reading of the use of the term "may" instead of "shall" in connection with mitigating factor findings. The Eleventh Circuit reasoned that mitigating factor findings are optional because the statute uses the word "may" in connection with mitigation findings while it uses the word "shall" in connection with statutory aggravating factors. Op. at App. A15-A-16)

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[19] Moreover, rather than relying on legislative history, the panel engages in judicial speculation when it claims that Congress was concerned that the process of preparing written mitigation findings is coercive. Op. at App. A16-A17. The congressional debates are silent on this issue. Nor did the panel explain why written findings are more coercive than oral deliberations. To the contrary, returning written findings ensures that each mitigating factor is carefully considered and that the jury deliberations are not necessarily concentrated on the consideration of aggravating factors as will be the inevitable tendency when the jury is asked to focus on writing down aggravating, but not mitigating, factors.

A close reading of the statutory language, however, reveals that the Eleventh Circuit misconstrued the grammar of § 848(k). The use of the term "may" in § 848(k) was, in fact, intended to direct the jury to return findings of mitigating factors if such factors were found to exist and not to return such findings if they were not found to exist.

Subsection (k) states that the jury "shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist". This sentence directs the jury to return findings of aggravating factors if the jury finds that they exist. In other words, the jury *may* return aggravating findings, depending upon whether they are found to exist.

Section 848(k) then proceeds to use the word "may" with respect to findings of non-statutory *aggravating factors*[20] and with respect to *mitigating factors*, but drops the phrase "found to exist". Read in light of subsection (q)'s unequivocal direction that appellate courts review "*every* aggravating factor", there is no question that the jury is required to return written findings of any non-statutory aggravating factors that it has found. The omission of the conditional language "found to exist" from this sentence of subsection (k) explains the use of "may", rather than "shall". "May" means the same thing in both the second and the third sentences of § 848(k), and has the same effect that "shall" has in the first sentence—the return of a finding is required if, but *only* if, any particular factor is found to exist.

Another reason Congress chose to use the terms "shall" in one instance and "may" in the other is that findings of statutory aggravating factors are necessary conditions to the imposition of a death sentence, whereas findings of non-statutory mitigating factors are not. The differing use of these terms is the result of the differing function of aggravating and mitigating factors in a

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[20] If the jury finds two statutory aggravating factors, "a special finding identifying any other aggravating factor for which notice has been provided under Subsection (h)(1)(B) of this section, *may* be returned." § 848(k) (emphasis added).

death penalty sentencing scheme and the varying contexts in which the terms are used. There is, thus, nothing in the grammar of § 848(k) to support the Eleventh Circuit's view that aggravating factors must be found in writing, but mitigating factors need not, depending on a particular jury's predisposition.

The only other linguistic distinction that the appellate court relied upon is the omission of the word "special" from the sentence concerning mitigating factors. Op. at App. A16. The omission is insignificant, given that subsection (k) is entitled "Return of Findings" and twice refers to findings of aggravating factors as "findings" rather than "special findings", thus reflecting Congress's synonymous treatment of the terms.[21]

Finally, in addition to being supported by the plain meaning of § 848(k), petitioner's position is thoroughly supported by the spirit of § 848. It is simply inconsistent with Congress' intent to accord mitigating factors the highest level of consideration—as evidenced by the lower proof standards of §§ 848(j) and (k) and the specifically mandated appellate review procedure provision of § 848(q)—to find that such written findings were intended to be "optional". Such a reading negates much of the precautionary care that characterizes the provisions of § 848 relating to mitigating factors.

### C. The Eleventh Circuit's Statement that Defendant Waived these Arguments Is Not a Bar to this Court's Review.

In addition to rendering erroneous substantive rulings concerning both § 848(q) and § 848(k), the Eleventh Circuit misapplied the rules relating to the preservation of errors by counsel and the appropriate standard of review. Accordingly, waiver should not be a bar to this Court's granting certiorari.

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[21] Section 848(k) provides, in part:

"A *finding* with respect to any aggravating factor must be unanimous . . . . The jury or the court, regardless of its *findings* with respect to aggravating and mitigating factors, is never required to impose a death sentence . . . ." (emphasis supplied)

First, as argued above, § 848(q)—not Rule 52 or the case law governing the constitutional standard of review in death penalty cases—controls the standard of appellate review in this case. Because that section mandates a remand where mitigating factor findings are not returned, the appellate court should have remanded the case for written mitigating factor findings without referring to Rule 52.

Second, even if Rule 52 is found to be relevant, the appellate court erred in ruling that trial counsel had not preserved the error. Op. at App. A14-A15.[22]

Finally, even if trial counsel did not adequately preserve the error as a technical matter, it should, nonetheless, be corrected under *United States v. Olano*, ___ U.S. ___, 113 S. Ct. 1770, 1779 (1993) ("the Court of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings'").

Sentencing Mr. Chandler to death, without even bothering to require the jury to return mitigating factor findings, eviscerates his statutorily guaranteed right to appellate review of mitigating factors provided in § 848(q). So significant an error will necessarily have a significant effect upon the fairness, integrity and public reputation of these judicial proceedings.

That conclusion is particularly warranted here because Mr. Chandler was only the second person ever to undergo a death

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[22] The Eleventh Circuit should have treated the issue as preserved by either defense counsel's proposed instructions requiring the jury to find mitigating factors (m) (6) and (m) (8) (Defendant's Requested Instructions Nos. a-5 and a-6 (RII-220))—which, if granted, would have preserved the error—or defense counsel's objection in his Memorandum in Support of David Ronald Chandler's Post-Trial Motions (RXVIII-257a at 15, 17, 22, 23), in response to which neither the district court nor the prosecution claimed that defense counsel had waived this issue. (Order, May 30, 1991 (RII-259); Government's Response to Defendant's Motion for New Trial (RII-257)).

penalty hearing under § 848.[23] Mr. Chandler should not be executed as a result of counsel's failure to object because Mr. Chandler was tried under this untested and complicated statute. *Cf. United States v. McCall*, 915 F.2d 811, 814 (2d Cir. 1990) (excusing counsel's failure to object where issue was of first impression under the federal sentencing guidelines); *United States v. Taylor*, 868 F.2d 125, 126 (5th Cir. 1989) (same).

In Mr. Chandler's case, at least one mitigating factor was supported by uncontested evidence (that Mr. Chandler "did not have a significant prior criminal record", see § 848(m)(6)), while two others were supported by substantial evidence.[24] Because the jury, in this case, however, was not asked to make any written findings of mitigating factors, the appellate court could not know whether the jury found that these mitigating factors existed or whether they considered them in the weighing process. (Special Findings (RII-221)) Further, because the evidence supporting the existence of the above three mitigating factors was strong, any error by the jury in failing to make such findings would certainly be prejudicial. This Court should grant certiorari to address this important question—which will certainly arise in the future—and to ensure that all § 848 defendants, including Mr. Chandler, are treated uniformly.

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[23] *United States v. Cooper*, 754 F. Supp. 617 (N.D. Ill. 1990) was the only case which preceded this case.

[24] These factors were § 848(m)(8) ("Another defendant . . . equally culpable in the crime, will not be punished by death") and § 848(m)(10) ("That other factors in the defendant's background or character mitigate against imposition of the death sentence"). In this case, the person who actually committed the murder, Jarrell, was not only not being punished by death, but, in fact, received complete immunity from the murder charge. In addition, there was substantial evidence that Mr. Chandler was devoted to his family.

## IV. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER THE CONSTITUTIONALITY OF SECTION 848'S USE OF THE MINIMUM THRESHOLD DEATH ELIGIBILITY REQUIREMENT OF *TISON V. ARIZONA* AS AN AGGRAVATING FACTOR.

Section 848(k) requires the jury to weigh aggravating and mitigating factors to determine whether to recommend a sentence of death. The first statutory "aggravating factor" set forth in § 848(n) is intentional or reckless killing—the minimum mens rea necessary to render a person eligible for the death penalty under *Tison v. Arizona*, 481 U.S. 137 (1987). The Eleventh Circuit disregarded this Court's holding in *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130 (1992) when it held that it was appropriate to include this overly broad factor in the jury's death penalty weighing process. *See* Op. at App. A26-A28.

The overbreadth of the (n)(1) factor is obvious. Virtually every murderer or felony-murderer possesses one of the four (n)(1) aggravating circumstances, which define the minimum threshold for capital murder under the eighth amendment. *See Enmund v. Florida*, 458 U.S. 782 (1982), *Tison v. Arizona*, 481 U.S. 137 (1987). Accordingly, Subsection (n)(1) does not serve to narrow the class of persons to those who should, on some rational basis, be selected for execution.

This Court has ruled many times that a death penalty statute cannot include aggravating factors which fail to meaningfully narrow the class of murderers eligible for the death penalty. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court invalidated the death sentence where the jury considered, as an aggravating factor, that the killing was "outrageously or wantonly vile, horrible or inhuman". This Court held that because the jurors might find any murder to be "outrageously or wantonly vile, horrible or inhuman", this factor failed to perform the

constitutionally required narrowing function and was inappropriately used as an aggravating factor.[25]

The "intent/recklessness" factor of 848(n)(1) is even broader than the factors found invalid in *Godfrey* and *Maynard* because it encompasses all persons eligible for the death penalty under *Tison*. As this court noted in *Arave v. Creech*, ___ U.S. ___, 113 S. Ct. 1534, 1542 (1993), "[i]f the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm". (emphasis supplied) *See also Maynard*, 486 U.S. at 365. The § 848(n)(1) factor is clearly too broad to serve as a legitimate aggravating factor in a death penalty statute.

The Eleventh Circuit, however, held that the "intent/recklessness" factor in § 848 did not render the statute defective, citing *Lowenfield v. Phelps*, 484 U.S. 231 (1988) for the proposition that the use and definition of aggravating factors need not undergo constitutional scrutiny if the narrowing function is adequately performed through the definition of the substantive offense. Op. at. App. A26-A28. This argument is entirely irrelevant, however, because *Stringer v. Black*, ___ U.S. ___, 112 S. Ct. 1130, 1137-38 (1992) made *Lowenfield* expressly inapplicable to statutes, such as § 848, which utilize a "weighing process" to determine whether a defendant should receive the death penalty.[26]

Although a § 848 jury must find at least one other aggravating factor, in addition to the "intent/recklessness" factor, in order to recommend death, the inclusion of "intent/recklessness" as an

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[25] *Accord Maynard v. Cartwright*, 486 U.S. 356 (1988) (aggravating factor defined as killing which was "especially heinous, atrocious, or cruel" found invalid as vague and overbroad); *Clemons v. Mississippi*, 494 U.S. 738 (1990).

[26] Both the Mississippi statute evaluated in *Stringer* and death penalty provisions of § 848 define a subset of all murders as capital murder and then require the jury to weigh aggravating against mitigating factors to determine whether a particular defendant should receive the death penalty.

aggravating factor fatally skews the weighing process. As this Court noted in *Stringer v. Black*:

> "A vague aggravating factor used in the weighing process is in a sense worse [than its use as a threshold factor to determine eligibility for the death penalty], for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. . . . [T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty."

*Stringer*, at 1139.

*Stringer v. Black* is controlling precedent in this case and requires that the overly broad "intent/recklessness" factor be removed from the weighing process. This Court's swift action in addressing this problem is needed to ensure that no one is executed under a defective statutory procedure which leaves open the risk of federally imposed death sentences in violation of the eighth amendment.

## V. SIGNIFICANT QUESTIONS ARE RAISED BY SECTION 848'S AMBIGUOUS DEFINITION OF THE OFFENSE AND THE TRIAL COURT'S FAILURE TO CLARIFY THAT AMBIGUITY IN ITS JURY INSTRUCTIONS.

Congress enacted § 848(e)(1)(A) to permit the imposition of the death penalty upon individuals who, while working in a continuing criminal enterprise, commit a murder *in connection with that enterprise*. Senator D'Amato, the sponsor of the bill in the Senate, described it as follows:

> "This legislation has been carefully crafted, Mr. President. It does not, as some suggest, say death to the drug dealers. But it does say very carefully that if you are involved in giving orders *to take another life in connection with a criminal conspiracy*, or if you execute that, order that you may be charged with appropriate punishment which can be the death penalty."

134 Cong. Rec. S7416 (daily ed. June 8, 1988) (emphasis added).

Unfortunately, the statute, as written, only requires that a murder be committed during the same time period that a person is engaged in a continuing criminal enterprise. It does not require a causal or purposeful connection between the two. The language is as follows:

> "Any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results . . . may be sentenced to death."

As a matter of plain English, the words "working in furtherance" modify the word "person"; they do not modify the phrase "intentionally kills". In other words, the sentence does not require that the killing be done "in furtherance" of the criminal enterprise, but merely that the person be engaged in or working in furtherance of the enterprise at the time he commits an intentional killing.

This flaw in the statutory language was noted in *United States v. Whiting*, 771 F. Supp. 476, 477 (D. Mass. 1991):

> "The statute is open to the interpretation that all that the government need prove is temporal coincidence. The killing might result from a bar brawl, domestic discord, or an unrelated robbery, even though the defendant was coincidentally engaging in a CCE at the same time."

Because such an interpretation would render the statute unconstitutional under the commerce clause,[27] the court, in *Whiting*, interpreted this section "to deal only with intentional

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[27] The literal interpretation of the statute would violate the commerce clause because Congress does not have the power to criminalize conduct "unrelated to commerce or any of the other areas committed to Congress by the Constitution." *Whiting*, 771 F. Supp. at 477.

killings that were directly related to the drug traffic, and in particular the CCE". *Id.*

In this case, the government, the Eleventh Circuit and the defendant are all in agreement that, despite the misleading statutory language, § 848(e) should be construed to criminalize only those killings which were done in furtherance of a continuing criminal enterprise. The disagreement arises as to whether the jury instructions were sufficiently clear so as to ensure that the statute was constitutionally applied in this case.[28]

The trial judge essentially read the ambiguous words of the statute to the jury, instructing that, in order to find the defendant guilty under § 848(e), it needed to find

> "that while engaging in or working in furtherance of the Continuing Criminal Enterprise charged in Count 2, the defendant either killed Marlin Shuler or commanded, induced, procured or caused the intentional killing of Marlin Shuler, as charged in count 3." (RXIII-187)

The Eleventh Circuit held that these instructions were sufficient. Op. at App. A36-A37. This slightly alternative phrasing, however, and the use of the word "while", do nothing to clarify the statute. The term "while" implies only temporal simultaneity, it does not convey the requirement of a causal or purposeful connection between the killing and the criminal enterprise. *See* Black's Law Dictionary 1596 (6th ed. 1990) ("while" is a "word of time and not of causation").

The jury instructions were, thus, ambiguous at best. The jury could have interpreted these words in accordance with their natural meaning as a matter of plain English and not in the causal manner necessary to render the statute constitutional. The possibility that the jury interpreted these words in a way as to

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[28] Likewise, because the same ambiguous phrasing was used in the indictment, the grand jury may have based its decision on the same erroneous interpretation. *See United States v. Carll*, 105 U.S. 611 (1881) (district court is required to make explicit the prosecution's obligation to prove the necessary causal connection).

render the statute unconstitutional as applied is of particular concern in this case where there was substantial evidence that if the defendant had solicited the killing of Marlin Shuler, he might have done so for personal reasons, unrelated to the continuing criminal enterprise.

The evidence of an enterprise-related motive--that the killing was in retaliation for the arrest of Donna Shuler in March 1989--was weak. The only witness to the killing was Jarrell, the triggerman, and the only explanation he offered as to Mr. Chandler's reason for soliciting Shuler's death was that Shuler had caused and threatened to continue to cause the family "trouble". (RVI-222; RVII-8, 10-11) Moreover, Jarrell testified that Chandler spoke to him about killing Shuler three or four months before May 8, 1990 (RVI-219; RVII-7-8), long before the search of Donna Shuler's home which occurred on March 2, 1990 (RX-43), and long before she received the affidavit which identified Shuler as an informant on April 27, 1990. (RX-122) Hence, the record would support a jury finding that if Mr. Chandler solicited the murder, he did so for personal reasons prior to, and absent any belief that, Shuler was an informant.

Furthermore, the jury could easily have rejected the prosecutor's claim that Mr. Chandler ever had such a belief. The central evidence bearing on whether Mr. Chandler knew that Shuler had cooperated with the Piedmont police consisted of a piece of paper found in Mr. Chandler's home with the words "copy of police report" and the name of Donna Shuler's attorney. (Gov. Exh. 85) Shuler's name did not appear on the notes, and no effort was made by the prosecution to establish that the handwriting was Mr. Chandler's. The prosecution provided no explanation of why Mr. Chandler planned a murder to protect Donna Shuler, a low-level distributor in the enterprise, when he made no effort to retaliate against the informant who caused Mr. Chandler's own arrest in Georgia on May 30, 1989. (RVI-84-87)

In light of the evidence presented in this case, the ambiguous phrasing read to the jury could easily have resulted in an unconstitutional death penalty. If the jury had been instructed to

make the proper finding—the finding that all parties concede the statute requires--it might have refused to do so. Given this fatal ambiguity, this Court should not permit Mr. Chandler's death sentence to stand.

## VI. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE ELEVENTH CIRCUIT'S OVERLY RESTRICTIVE INTERPRETATION OF 28 U.S.C. § 455(a).

In the course of ruling on a pretrial motion the district court stated that Jarrell would do anything for Mr. Chandler, implying that Jarrell would even murder for Mr. Chandler: "Jarrell was an alcoholic lacky [sic] for Chandler who for $500, or maybe simply a fifth of liquor, likely would have done anything Chandler directed him to do." (RI-201) Petitioner moved for recusal pursuant to 28 U.S.C. § 144 and 455, claiming that this statement, tantamount to making a decision as to Mr. Chandler's guilt prior to trial, demonstrated the court's lack of impartiality. This motion was denied. The Eleventh Circuit upheld the district court's denial of Mr. Chandler's recusal motion, following Eleventh Circuit precedent that bias arising from judicial proceedings is generally not a proper basis for recusal. Op. at App. A49-A50.

Section 455(a) states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Petitioner submits that § 455(a) was meant to address judicial bias of any kind, regardless of how such bias arises. This issue is currently before this Court in another Eleventh Circuit case, *Liteky v. United States*, 973 F.2d 910 (11th Cir. 1992), *cert. granted*, ___ U.S. ___, 113 S.Ct. 2412 (1993). As a remand would be necessary if the Court revises the Eleventh Circuit's rule in *Liteky*, the Court should, at minimum, hold this case pending the outcome of *Liteky*.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

December 28, 1993

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## APPENDIX
## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JULY 19, 1993 (AS MODIFIED SEPT. 30, 1993) | A1 |
| ORDER OF ELEVENTH CIRCUIT DATED SEPT. 30, 1993 GRANTING THE MOTION OF THE UNITED STATES FOR MODIFICATION OF PANEL'S OPINION | A56 |
| ORDER OF ELEVENTH CIRCUIT DENYING MR. CHANDLER'S MOTION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC DATED SEPT. 30, 1993 | A57 |
| JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA AS TO COUNT 3 OF THE INDICTMENT DATED MAY 14, 1991 | A59 |
| JUDGMENT OF THE DISTRICT COURT AS TO COUNTS 1, 2, 4, 5, 6, 7, 8, 9 DATED MAY 14, 1991 | A61 |
| ORDER OF THE DISTRICT COURT DENYING MR. CHANDLER'S MOTION FOR NEW TRIAL ON GUILT AND PENALTY PHASES DATED MAY 30, 1991 | A66 |
| 21 U.S.C. § 848 | A70 |
| DAVID BRUCK, FEDERAL DEATH PENALTY PROSECUTIONS, 1988-93 (DEC. 8, 1993) | A84 |
| S2455, 100TH CONG., 2D SESS. §1(K)(1988) | A89 |

IN THE

# United States Court Of Appeals

FOR THE ELEVENTH CIRCUIT

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Nos. 91-7466 & 91-7577

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D. C. Docket No. CR-90-H-266-E

UNITED STATES of AMERICA,

*Plaintiff-Appellee,*

*-versus-*

DAVID RONALD CHANDLER,
a/k/a RONNIE CHANDLER,

*Defendant-Appellant.*

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Appeals from the United States District Court
for the Northern District of Alabama

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July 19, 1993

As Modified Sept. 30, 1993.

1993 Rehearing and Suggestion for
Rehearing En Banc Denied
Sept. 30, 1993.

Before FAY, EDMONDSON and BIRCH, Circuit Judges.

BIRCH, Circuit Judge:

This appeal challenges the first death sentence imposed under the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(e) *et seq.* The

defendant Ronald David Chandler appeals both his conviction and sentence on the capital charge as well as his convictions and sentences on other related counts. We VACATE Chandler's conviction and sentence for conspiracy. We AFFIRM all other convictions and sentences, including Chandler's death sentence.

## I. BACKGROUND

On May 8, 1990, Charles Ray Jarrell, Sr. and Marlin Shuler drove to Snow's Lake in Piedmont, Alabama. At the lake, Jarrell and Shuler engaged in target practice with two pistols that Jarrell had brought along. Jarrell turned his gun at Shuler and then shot and killed him.

Later that year the State of Alabama indicted Jarrell, Jarrell's son Billy Joe, and Chandler for the murder of Shuler. These indictments were ultimately dismissed, but the state prosecutor handling those charges was appointed Special Assistant United States Attorney and assisted in this prosecution.

The United States issued a superseding indictment on January 9, 1991. Count One of the indictment charged Chandler, Jarrell and 14 other individuals with conspiracy to possess with intent to distribute and with distribution of over 1,000 kilograms of marijuana and 1,000 marijuana plants, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Chandler was also indicted on eight other counts: Count Two, engaging in a continuing criminal enterprise, in violation Of 21 U.S.C. § 848(a); Count Three, murder while engaged in and working in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e); Counts Four and Five, aiding and abetting the use or carrying of a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and Counts Six, Seven, Eight, and Nine, money laundering in violation of 18 U.S.C. § 1956.

On January 17, 1991, Jarrell entered into a plea agreement with the government. Jarrell pleaded guilty to the conspiracy charge in Count One of the indictment and agreed to testify on behalf of the government at Chandler's trial. In exchange, Jarrell received immunity from prosecution for Shuler's murder from the State of Alabama and the United States.

On January 30, 1991, the government served notice, pursuant to 21 U.S.C. § 848(h)(1), of its intention to seek the death penalty against Chandler for the murder of Shuler under Count Three. The notice stated that the government would attempt to prove the following aggravating factors as the basis for the death penalty: (1) Chandler did intentionally kill Shuler; (2) Chandler did intentionally engage in conduct intending that Shuler be killed; (3) Chandler procured the murder of Shuler by payment and promise of payment of money; and (4) Chandler committed the murder after substantial planning and premeditation.

Chandler's trial was severed from the other co-conspirators' trials and commenced on March 19, 1991. The government's evidence consisted of over 40 witnesses, including a number of indicted and unindicted co-conspirators. Their testimony described the following events.

During the years of 1988 to 1990, Chandler developed an extensive marijuana growing and distribution operation that was centered in northeast Alabama, but operated in both Alabama and neighboring states. Chandler developed his supply of marijuana through the local farming of thousands of marijuana plants in northeast Alabama and the importation of marijuana from as far away as Texas. Chandler then used an extensive distribution network to generate substantial profits from his illegal activities. The profits were used in part to fund the growth of his operation and in part to purchase land and property.

The size of Chandler's operation was significant. In 1989 and again in 1990, Chandler helped prepare and cultivate over 100 plots of land dedicated solely to marijuana plants. In 1989, Chandler harvested most of the several thousand marijuana plants that were originally planted. In 1990, the harvest was disturbed by government raids that seized over 500 marijuana plants from Chandler's plots. In overseeing this operation, Chandler was not only actively involved in the cultivation of the plants, but he also hired several people to guard the plots during the growing season.

Chandler also arranged for supplies of marijuana from other locations, including a major source in Texas. In a four month period in 1990, Chandler engaged Jarrell as a courier to import

approximately 245 pounds of marijuana from Texas in four deliveries. A fifth delivery was thwarted when a different courier was arrested with $106,000. Chandler also obtained supplies of marijuana in neighboring states.

Chandler developed a distribution system of couriers and dealers to facilitate his sale of marijuana. On occasion, Chandler gave his couriers firearms to provide protection for his marijuana. It was a perceived threat to this dealer network that caused Chandler to resort to murder.

One of Chandler's dealers was Donna Shuler, the half-sister of both Chandler's wife and Jarrell. On March 2, 1990, state law enforcement officers executed a search warrant on Donna Shuler's home in Piedmont, Alabama, and uncovered several bags of marijuana totaling approximately one kilogram. The search warrant was based upon the affidavit of the local police chief. In the affidavit, the police chief stated that Shuler, the former husband of Donna Shuler, had complained on at least three occasions that Donna Shuler was dealing drugs from her home. Following the search, Donna Shuler was charged with drug trafficking.

Donna Shuler's attorney, Bill Broome, waived the formal preliminary hearing in exchange for the opportunity to look through the local district attorney's file, including the police report. On April 27, 1990, Broome made copies of the search warrant and the police chief's affidavit and supplied copies of them to Donna Shuler. A subsequent search of Chandler's residence on September 21, 1990, found a slip of paper which contained the words "Bill Broome" and "copy of police report."

Following the search of Donna Shuler's apartment, Chandler approached another of his dealers, Raymond Pointer, and asked him if he "was interested in making a little bit bigger money." RVII-75. Chandler told Pointer that he would pay him $5,000 to kill Shuler because Shuler "had gone and busted somebody in Piedmont." RVII-77. Chandler then opened a briefcase containing packets of hundred dollar bills and a nine millimeter pistol. Chandler also advised Pointer that he would pay him even more

money if Pointer would kill the Piedmont Chief of Police. Pointer, however, declined Chandler's offer.

On the morning of May 8, 1990, Chandler arrived at Jarrell's house. Also present at the house was Shuler. Upon seeing Shuler, Chandler warned Jarrell, "He's going to cause me and you a whole lot of trouble," and "You need to go on and take care of him and I still got that $500.00." RVII-10. Jarrell understood Chandler to be referring to a conversation Jarrell had with Chandler in January, 1990. In that conversation, which occurred before the search of Donna Shuler's home, Chandler announced that Jarrell should eliminate Shuler due to all of the problems that Shuler had caused for Jarrell and his family, declaring that he would pay Jarrell $500 if Jarrell accomplished the task. At that time, Jarrell thought that Chandler was joking.

Chandler then left Jarrell's house and Jarrell and Shuler spent the morning drinking heavily. The two then drove to Snow's Lake where they engaged in target practice with two guns Jarrell had brought: a .380 pistol owned by Jarrell and a nine millimeter pistol that Chandler had placed in Jarrell's car the previous evening. Jarrell then turned the nine millimeter pistol on Shuler, shot twice and killed him. Jarrell drove directly to Chandler's home and advised Chandler that he had killed Shuler. Jarrell then returned to Snow's Lake accompanied by Chandler, carried Shuler's body to the other side of the mountain bordering Snow's Lake, and buried the body near an abandoned moonshine still. Jarrell asked for the $500, but Chandler did not pay him.

At approximately the same time that Shuler was murdered, Chandler was also attempting to protect his operation from individuals who were stealing his marijuana crop. Chandler suspected that two individuals, Patrick Burrows and Jeffrey McFry, were stealing his marijuana. Chandler warned several people that he would kill McFry and Burrows if they continued to steal marijuana. Chandler later announced to one of his dealers that Burrows was dead and that McFry would be next if McFry did not quit stealing Chandler's marijuana. Neither Burrows nor McFry were seen after September, 1990.

The defense argued that while Chandler may have been involved in individual marijuana transactions, he was not involved in a conspiracy with the 16 other individuals as charged in the superseding indictment. Further, under no interpretation of the evidence was Chandler the head of a continuing criminal enterprise.

The defense also introduced evidence that there was a history of animosity between Jarrell and Shuler that gave Jarrell an independent reason to kill Shuler. Donna Shuler, the half sister of Chandler's wife and Jarrell, was once married to Shuler. The couple lived for a time with Donna's mother. During their marriage Shuler repeatedly abused his wife and his mother-in-law. Jarrell and his sons frequently came to their defense and would argue and fight with Shuler. In 1989, during an argument between Shuler and Jarrell, Jarrell told Shuler that he was going to kill him, pointed a pistol at Shuler's head, and pulled the trigger. Although the gun was loaded, it failed to fire.

Defense counsel also attacked the putative gaps in the government's case. Chandler's counsel emphasized that a number of the government's key witnesses had entered into plea agreements in which testimony was exchanged for a recommendation of a lesser sentence.

On April 2, 1991, the jury found Chandler guilty on all nine counts. As provided under 21 U.S.C. § 848(i)(1)(A), the district court on the next day conducted a death penalty sentencing hearing before the same jury. The government resubmitted all of the evidence used at the guilt phase that was relevant to the death of Shuler or to the presence of aggravating or mitigating factors. The government and Chandler stipulated that Chandler had no prior convictions on any felony or drug charge and that state murder charges against Jarrell and Jarrell's son in connection with the Shuler murder had been dismissed and that neither the United States nor Alabama would prosecute either one for murder. Chandler's mother and wife testified for the defense.

Following detailed instructions from the district court, a unanimous jury found that the government had established two aggravating factors: (1) Chandler intentionally caused the death

of Shuler and (2) Chandler procured the murder by promising the payment of money. The jury unanimously recommended that Chandler be sentenced to death. On May 14, 1991, the district court sentenced Chandler to life imprisonment on Counts One and Two, two consecutive five year sentences on Counts Four and Five, and six years of imprisonment on Counts Six, Seven, Eight and Nine. Based on the jury recommendation, the district court sentenced Chandler to death on Count Three as mandated by 21 U.S.C. § 848(q)(1).

Chandler moved for a new trial as to both phases of his trial. These motions assigned numerous errors to both the guilt and sentencing phases of the trial. Some arguments renewed previous attacks and others were made for the first time. The district court denied the motions, but stayed enforcement of the capital sentence pending appeal. Chandler filed two appeals to this court. The first challenged the capital sentence under Count Three. The second contested his conviction on Count Three and his convictions and sentences on the non-capital counts. We consolidated the two appeals under 21 U.S.C. § 848(q)(1).

## II. THE STATUTORY SCHEME

### A. Overview Of Section 848

The Anti-Drug Abuse Act of 1988 establishes as a capital offense the intentional killing of a person in connection with the commission of a continuing criminal enterprise. The Act details procedures to be followed before a defendant may be sentenced to death.

Initially, the government must serve notice "a reasonable time before trial" of its intent to seek the death penalty. 21 U.S.C. § 848(h)(1). If a defendant is found guilty of violating Section 848(e)(1)(A), a separate sentencing hearing must be conducted, generally before the same jury that determined guilt. 21 U.S.C. § 848(i)(1)(A). The purpose of the hearing is to permit consideration of any aggravating and mitigating factors relevant to whether the defendant should be sentenced to death. 21 U.S.C. § 848(j). The information presented at sentencing need not conform to the Federal Rules of Evidence, so long as the district

court is convinced that its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury. *Id.*

The process by which a jury is to consider sentencing factors is specific. The government must prove beyond a reasonable doubt and to the unanimous satisfaction of the jury at least two of the aggravating factors expressly set forth in the statute. 21 U.S.C. § 848(j), (k). It must advise the defendant a reasonable time before trial of those aggravating factors it intends to prove. 21 U.S.C. § 848(h)(1). One of these must be from among the four listed in Section 848(n)(1). The other must be from among those listed in Section 848(n)(2)-(12). Absent a finding of these aggravating factors, a jury cannot impose the death penalty. 21 U.S.C. §§ 848(k).

If a jury makes the required findings of aggravating factors, it then considers any mitigating factors established by the defendant. 21 U.S.C. § 848(k),(m). Mitigating factors need only be established by a preponderance of the evidence, and any juror persuaded of a mitigating factor may consider it in reaching a sentencing decision; unanimity as to what factors are mitigating is not required. 21 U.S.C. § 848(j),(k).

A jury that finds the required aggravating factors must consider whether these factors so outweigh any mitigating factors as to justify a sentence of death. 21 U.S.C. § 848(k). Absent any mitigating factors, a jury must still unanimously find that the aggravating factors are themselves sufficient to justify a sentence of death. *Id.* Invidious factors, such as race or sex, cannot influence a jury's recommendation of the death penalty. Each juror must sign a certificate attesting that neither the defendant's nor the victim's "race, color, religious beliefs, national origin, or sex" played any part in the deliberations. 21 U.S.C. § 848(o)(1).

Although a jury cannot vote for the death penalty absent the required findings just detailed, a jury is never *required* to impose a death sentence even if it finds sufficient grounds to do so under the applicable law. Indeed, a court must specifically so instruct the jury. 21 U.S.C. § 848(k). Although the statute denominates a jury's finding in favor of the death penalty a "recommendation,"

it is determinative, for upon such a "recommendation" the trial court "shall sentence the defendant to death." 21 U.S.C. § 848(1).

Appellate review of a death sentence is expressly provided by the statute. 21 U.S.C. § 848(q)(1). Such appeal may be consolidated with a challenge to the judgment of conviction, and the case is to be given priority on the appellate docket. *Id.*

**B. Standard Of Review**

Section 848 contains two provisions that address our review of death sentences imposed under Section 848(e). Section 848(q)(2) states:

> On review of the sentence, the court of appeals shall consider the record, the evidence submitted during trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

Section 848(q)(3) provides:

> The court shall affirm the sentence if it determines that-
>
> (A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

There is nothing in these sections altering our ordinary standards of review. Instead, these sections serve to emphasize the serious nature of capital cases and the importance of careful review.

## III. DISCUSSION

**A. Challenges To The Death Sentence**

**1. Jury power to recommend a sentence other than death**

Section 848(k) provides that if the jury finds certain aggravating factors, the jury must then weigh the aggravating factors against any mitigating factors to determine whether to recommend "that a sentence of death shall be imposed rather than

a sentence of life imprisonment without possibility of release or some other lesser sentence." At Chandler's sentencing, the district court instructed the jury that in the event that it did not recommend a sentence of death, it should not be concerned with the question of what sentence he might receive. The district court also stated that the judge alone would decide Chandler's sentence if the jury did not recommend death.

Chandler contends that the district court violated Section 848(k) as well as the Fifth and Eighth Amendments by withholding from the jury the authority to impose a sentence other than death. However, at a pre-sentencing hearing, Chandler's counsel asserted that "I don't think they [the jurors] make a recommendation of a sentence if they don't recommend death." XIV-40. The proposed jury instructions submitted by Chandler advised that if the jury did not recommend a death sentence, the responsibility for imposition of a non-death sentence rested with the district court. Because Chandler both argued for and submitted jury instructions stating that the district court alone was responsible for sentencing Chandler if the jury did not recommend death, Chandler invited the alleged error and cannot now, on appeal, complain that the instruction was erroneous. *Leverett v. Spears*, 877 F.2d 921, 924 (11th Cir. 1989).

Had Chandler not invited the instruction, the district court properly construed Section 848(k). When the language of a statute is clear, the language controls any interpretation of the statute absent a legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981); *Harper v. Better Business Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir. 1992). We must look to the language and design of the statute as a whole in interpreting the language at issue. *McCarthy v. Bronson*, ___ U.S. ___, ___, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991).

The language of Section 848(k) is not perfectly clear, and the legislative history of the Anti-Drug Abuse Act of 1988 consists of only a few debates on the Senate floor. Nevertheless, Section 848(k) can be confidently interpreted when it is read in the context of the statute as a whole. Several provisions of

Section 848 suggest that Chandler's interpretation is flawed. Section 848(1) provides:

> Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law.

The second sentence of this section instructs that the district court determines the sentence if the jury does not recommend death. Similarly, Section 848(p) provides:

> If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

Thus, the statute grants the district court the discretion to sentence a defendant to life without parole if a death sentence is not recommended. These sections preclude an interpretation of Section 848(k) that gives the jury the authority to impose a non-death sentence. Correspondingly, the responsibility for sentencing has historically resided with the trial court. In the absence of clear language in a statute to lodge the sentencing responsibility with the jury, we are reluctant to interpret the statute in a strained manner to reach that result. Hence, we find that Section 848 grants the district court the power to sentence the defendant where the jury does not recommend death.

Chandler next insists that our interpretation of Section 848(k) violates the Fifth and Eighth Amendments. Chandler relies on *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). In *Beck*, the Court held that a jury in a capital case must be permitted to consider a verdict of guilty on a lesser included non-capital offense where the evidence would support such a verdict. The jury will thus not be put in a position of choosing between guilt on a capital offense and acquittal. Chandler argues that the jury at his sentencing was put in a similar position.

However, Beck is not directly applicable in capital sentencing hearings. *California v. Ramos*, 463 U.S. 992, 1007-09, 103 S.Ct. 3446, 3457, 77 L.Ed.2d 1171 (1983). In Chandler's case, prior

to sentencing the jury found Chandler guilty of murder in connection with a continuing criminal enterprise. Therefore, the jury was not choosing between guilt of a capital crime and acquittal. It was choosing between a penalty of death and some other sentence yet to be determined by the trial judge.

Chandler also invokes *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). In *Hicks*, the Court held that due process requires that a jury must be informed of all sentences that the statute allows it to impose when exercising sentencing power. *Id.* at 346, 100 S.Ct. at 2229. In *Hicks*, the jury was vested with the power to *determine* the defendant's sentence, capital or otherwise. In this case, *Hicks* provides no guidance. The issue before us is whether Section 848 gives the jury the power to *recommend* a sentence other than death. Unless that question is answered in the affirmative, *Hicks* provides no guidance.

The Court has ruled that there is no single correct way to structure a death sentencing procedure. *Morgan v. Illinois*, ___ U.S. ___, ___, 112 S.Ct. 2222, 2228, 119 L.Ed.2d 492 (1992); *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984). Indeed, there is also no constitutional requirement that juries be allowed to participate in capital sentencing. *Id.* at 459, 104 S.Ct. at 3161-62. Accordingly, there is nothing unconstitutional with the procedure Congress established in Section 848. The jury has the sole power to recommend a sentence of death. If the jury does not recommend a death sentence, the trial judge has the responsibility to impose a sentence other than death. *Hicks* is inapplicable to Chandler's case because the jury, in this case, was instructed on the full range of its sentencing power; that is, the power to recommend a death sentence.

**2. Jury should have been informed of other sentences**

Chandler contends that even if the jury did not have the power to recommend a sentence other than death, under Section 848(k) and applicable precedent, the jury should have been informed of the possible sentences Chandler would face if the jury did not recommend death. We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the

prejudice of the objecting party. *United States v.Myers*, 972 F.2d 1566, 1572 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1813, 123 L.Ed.2d 445 (1993). The instructions must be viewed as a whole in the context of the trial record. *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); *Peek v. Kemp*, 784 F.2d 1479, 1492 n.13 (11th Cir. 1986), *cert. denied*, 479 U.S. 1047, 107 S.Ct. 912, 93 L.Ed.2d 862 (1987). Further, an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner. *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); see *Estella v. McGuire*, __ U.S. ___, ___, 112 S.Ct. 475, 482 n.4, 116 L.Ed.2d. 385 (1991).

Initially, Chandler asserts that Section 848(k) requires that the jury be informed that he would face some other sentence, including the possibility of a life sentence without parole, if the jury did not recommend the death penalty. Section 848(k) instructs that after weighing the aggravating and mitigating factors and determining that the aggravating factors sufficiently outweigh the mitigating factors, the jury may then exercise its option to

> recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence.

At sentencing the district court instructed the jury:

> In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence. That is a matter for me to decide in the event you conclude that a sentence of death should not be recommended.

RXV-85. The district court also instructed:

> If you do not make such a recommendation, the court is required by law to impose a sentence other than death, which sentence is to be determined by the court alone.

RXV-87. Chandler's argument, in effect, is that the district court's instruction was inadequate because it did not inform the jury that the "sentence other than death" included the possibility of life without parole.

We find that the district court's instructions adequately informed the jury under Section 848(k). The statutory scheme created by Section 848 provides that the jury alone has the power to recommend a sentence of death. If the jury does not make such a recommendation, the district court sentences the defendant. Nothing in Section 848 requires the jury to be informed of what sentence the defendant might receive in the absence of death. The district court's instructions were proper.

Chandler also suggests that applicable precedent, mandating that a defendant be allowed to introduce evidence relating to mitigating factors, requires that the jury be informed of the possibility that Chandler would receive a life sentence without parole if death was not recommended. The Supreme Court has defined mitigating factors as "any aspect of a defendant's character or record and any of the circumstances of the offense." *Locket v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); *see Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S.Ct. 1669, 1670-71, 90 L.Ed.2d 1 (1986). The range of possible sentences that Chandler might receive in the event the jury did not recommend death does not fall within this definition. Accordingly, the district court was not required to inform the jury of the possible sentences Chandler might face.

**3. Return of mitigating findings**

Chandler urges us to rule that the district court should have required the jury to return written findings of mitigating factors it did or did not find to exist. At no time, however, did Chandler request that the jury be instructed to return written findings of mitigating factors or object to the lack of such an instruction. Chandler did submit proposed jury charges that instructed the jury that they should find two mitigating factors: (1) that Chandler lacked a criminal record, and (2) that an equally culpable defendant would not receive the death penalty. These requested instructions did not adequately bring to the district court's

attention the issue now presented on appeal. Thus, we review for plain error. Fed. R. Crim. P. 52(b).

The finding of plain error is a three step process: (1) there must be an error, (2) the error must be plain, i.e. clear or obvious, and (3) the error must affect substantial rights. *United States v. Olano*, ___ U.S. ___ , ___, 113 S.Ct. 1770, 1777-78, 123 L.Ed.2d 508 (1993). In most cases, the third prong of this test is met only when the defendant demonstrates that the error affected the outcome of the proceedings before the district court. *Id.* at 1778. If, however, the error affects the basic protections of a criminal trial without which a criminal trial cannot reliably serve its function, an effect on the outcome will be presumed. *Id.*; *see Arizona v. Fulimante*, ___ U.S. ___, ___, 111 S.Ct. 1246, 1264-65, 113 L.Ed.2d 302 (1991) (distinguishing between trial type errors and errors which undermine the entire trial). If the defendant satisfies all three prongs, then we have the discretionary power to correct an error which seriously affects the fairness, integrity or public reputation of judicial proceedings. *Olano*, ___ U.S. at ___, 113 S.Ct. at 1778-79.

We first determine whether an error occurred. We disagree with Chandler's interpretation of Section 848 that the jury is required to return written findings of mitigating factors that the jury has either found to exist or found not to exist. Instead we interpret Section 848 as providing the jury with the *option* of returning written findings of mitigating factors. Because the district court's instructions and verdict form foreclosed the jury's exercise of this option, the district court committed error.

Section 848(k) is entitled "Return of Findings." It provides that the jury "shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist." The section also states:

> A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established.

The statute mentions special findings only in relation to aggravating factors. Also, the permissive language concerning the return of written mitigating findings, "may be made," contrasts with the mandatory language concerning the return of written aggravating findings, "shall." The jury is required to return aggravating findings and is permitted to return mitigating findings. Therefore, we find that Section 848 requires that the jury be instructed that it has the option to return written findings of mitigating factors if it so chooses, but that it does not require the return of such findings.

Section 848(q) does not require a different result. This section states that on review of a death sentence, "the court of appeals shall consider . . . the special findings returned under this section." 21 U.S.C. § 848(q)(2). The section also instructs, in pertinent part, that we shall affirm a death sentence if

> the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

21 U.S.C. § 848(q)(3)(B). Neither of these subsections mandate the written findings of mitigating factors. They require only that we review any findings which are returned to ensure that the information presented during sentencing supports those findings. We hold that Section 848(k) requires that the jury be given the option to return written findings of mitigating factors. Section 848(q)(3) requires that if the jury exercises its option, we must review those findings.

This interpretation comports with the law as it stood at the time Congress drafted the Anti-Drug Abuse Act of 1988. The finding of mitigating circumstances is individualized; a juror is free to find a mitigating factor even if no other juror agrees with that finding. *See Mills v. Maryland*, 486 U.S. 367, 373-74, 108 S.Ct. 1860, 1865, 100 L.Ed.2d 384 (1988). Congress may well have determined that forcing jurors to write down mitigating factors would discourage a lone juror from finding mitigating circumstances that the rest of the jury had rejected or disparaged. More significantly, by not requiring a juror to inform his or her

fellow jurors of the mitigating factors that will be used in that juror's weighing calculus, the individualized determination of both mitigating factors and the appropriateness of a death sentence is protected.

The district court in this case did not inform the jury that it had the option to return written findings of mitigating factors and the verdict form did not contain space for the optional findings. This was error. Moreover, the error was plain. The statute, as we interpret it in this opinion, requires that the jury be given an option to return mitigating findings.

Accordingly, we must determine whether the error affected Chandler's substantial rights. We note initially that this error does not undermine the basic protections of a criminal trial without which a criminal trial cannot reliably serve its function, but instead is a trial type error. Chandler must therefore demonstrate that the error affected the outcome of the proceedings before the district court. Chandler argues that he was prejudiced because an appellate court on review cannot determine whether the jury found two mitigating factors which Chandler contends were beyond dispute: (1) that Chandler had no criminal record; and (2) that Jarrell was an equally culpable person who would not receive the death penalty.

We are persuaded that the lack of written mitigating findings did not affect the outcome of Chandler's sentencing hearing. The government and Chandler stipulated that Chandler had no prior conviction on any felony or drug charge and that Jarrell would not receive the death penalty. These stipulations were presented at sentencing to the jury, and the jury was informed that they were stipulations. Moreover, the jury was properly instructed on how to find mitigating factors and the role of mitigating factors in their decision making process. The jury is presumed to follow the instructions they are given. *See Richardson v. Marsh*, 481 U.S. 200, 206, 107 S.Ct. 1702, 1707, 95 L.Ed.2d 176 (1987). Thus, Chandler has not demonstrated that the lack of written mitigating findings affected the outcome of his case.

In conclusion, the district court erred by not allowing the jury the option to return written findings of mitigating factors.

However, this error did not affect the outcome of the sentencing hearing and was, therefore, not plain error.

**4. Jury unanimity at sentencing**

Section 848(k) provides that a recommendation of death may be returned only by the jury's unanimous vote. Section 848(l) provides:

> Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law.

When read in conjunction, these subsections provide that in the event the jury cannot unanimously recommend a death sentence, the district court must sentence the defendant to some non-death sentence.

At sentencing, the district court instructed the jury that:

> [i]n order to bring back a verdict recommending the punishment of death, all twelve of you must vote in favor of recommending the death penalty. In other words, a verdict recommending a sentence of death must be unanimous.

RXV-87. The jury was also charged:

> If you do not make such a recommendation, the court is required by law to impose a sentence other than death, which sentence is to be determined by the court alone.

RXV-87. The court admonished the jury that it was never *required* to recommend a death sentence.

The district court provided the jury with a verdict form to complete during deliberations. The verdict form contained blanks for the jury to check after it made findings. In the section

containing the jury's recommendation for or against a death sentence, the form provided:

> We the jury unanimously vote to recommend, and do unanimously recommend that
>
> ___ a sentence of death *be imposed*
>
> ___ a sentence of death *not be imposed*
>
> upon defendant David Ronald Chandler.

RII-221-3. Chandler argues that Section 848 along with the constitutional requirement that the jury not be misinformed or coerced during a capital sentencing require that the jury be instructed that the failure to reach unanimity would result in Chandler receiving some non-death sentence as determined by the court.

Several courts have held that a trial court must instruct the jury on the consequences of a lack of unanimity at the sentencing stage (a "hung" jury). The Delaware Supreme Court held that, because Delaware's capital statute provides that the failure to reach unanimity results in a life sentence, the jury must clearly and explicitly be instructed that the jury need not be unanimous for a life sentence to be imposed. *Whalen v. State*, 492 A.2d 552, 562 (Del. 1985). The New Jersey Supreme Court, in construing a similar capital statute, held that the statute and the unique nature of a death case require that the trial court inform the jury of the consequences of a non-unanimous decision. *State v. Ramseur*, 524 A.2d 188, 283-84 (N.J. 1987). Louisiana has reached the same conclusion. *State v. Williams*, 392 So.2d 619, 633-34 (La. 1980). Chandler points out that in other Section 848(e) prosecutions, the district courts have instructed the jury on the consequences of a hung jury and provided a verdict form that allowed the jury to state that they were unable to reach a unanimous verdict.

Other courts, however, have held that a defendant is not entitled to an instruction informing the jury of the consequences of a lack of unanimity. The Fourth Circuit held that even though the Virginia capital statute requires that the defendant receive a life sentence if the jury is unable to reach unanimity, the defendant is not entitled to a hung jury instruction. *Evans v. Thompson*, 881 F.2d 117, 123-124 (4th Cir. 1989), *cert. denied*,

497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990). The Fourth Circuit also held that, although the South Carolina capital statute requires an instruction on the consequences of a hung jury, the lack of such an instruction has no affect on the sentencing decision. *Gaskins v. McKellar*, 916 F.2d 941, 955 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2277, 114 L.Ed.2d 728 (1991). North Carolina, Florida and Alabama do not require the jury to be informed of the effect of a failure to reach a unanimous verdict. *Barfield v. Harris*, 540 F. Supp. 451, 472 (E.D.N.C. 1982). *See also Aldridge v. State*, 351 So.2d 942, 944 (Fla. 1977) (per curiam); *Coulter v. State*, 438 So.2d 336, 346 (Ala. App. 1982) (collecting cases).

We find the reasoning of the second set of authorities persuasive and hold that the district court is not required to instruct the jury on the consequence of the jury's inability to reach a unanimous verdict. There is no requirement that instructions to the jury duplicate the statutory language. Section 848(l) is an instruction to the court and not for the jury. Our holding is further supported by the general interest the criminal justice system has in unanimous verdicts. Asking the jury to return a unanimous verdict forces jurors to examine their views on the case and engage in discussions and deliberations as they attempt to resolve their differences.

We reject the suggestion that the instructions or verdict form in some way coerced the jury into a recommendation of death. Similar instructions are given during the guilt stage of criminal proceedings. That an *Allen* type charge was given in the present case does not create any coercion.[1] Although the instruction stated that jurors should "not hesitate to re-examine your own opinion, and to change your mind if you become convinced that you are wrong," it also admonished, "do not give up you honest beliefs . . . solely because the others think differently or merely to get the case over with." RXV-87. When this instruction is coupled with the court's statement that Chandler would receive

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[1] An *Allen* charge derives its name from *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896).

the death penalty only if all jurors unanimously agreed to recommend death, we conclude the *Allen* charge was not coercive. *See Lowenfield v. Phelps*, 484 U.S. 231, 237-238, 108 S.Ct. 546, 550-51, 98 L.Ed.2d 568 (1988).

Finally we note that unlike many of the coercion cases discussed here and in Chandler's brief, there was no indication in this case that the jury was anything but unanimous. After a two week trial, the jury deliberated for just under three hours before returning a recommendation of death. Moreover, each juror was required to sign the verdict form and each juror, when polled, affirmed the decision.

To conclude, we hold that in the sentencing phase of a Section 848(e) prosecution, the district court is not required to instruct the jury on the consequences of an inability to reach a unanimous verdict. Chandler also failed to demonstrate that the jury was in any way coerced in this case.

**5. Propriety of the evidence at sentencing**

Section 848 establishes a procedure for the introduction of evidence at the sentencing phase. Before trial, the government must provide the defendant with a list setting forth each aggravating factor that the government will attempt to prove as a basis for the imposition of the death penalty. 21 U.S.C. § 848(h)(1)(B). At the sentencing hearing, the government may present information relevant to any of the aggravating factors set forth in the Section 848(h)(1)(B) list as long as the probative value of the information is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. 21 U.S.C. § 848(j).

Prior to trial, the government provided a list to Chandler of the three aggravating factors on which it would rely in seeking the death penalty. The three factors were: (1) Chandler did intentionally kill or intentionally engage in conduct intending the killing of Marlin Shuler, Section 848(n)(1); (2) Chandler procured the murder of Shuler by promise of payment of money, (n)(6); and (3) Chandler committed the murder after substantial planning and premeditation, (n)(8).

At the guilt phase, the government introduced evidence that Chandler had made threats against McFry and Burrows because he thought they were stealing his marijuana and that the two had not been seen since the threats were made. Prior to the sentencing hearing, Chandler submitted proposed jury instructions. Proposed Instruction 14 stated that it would be inappropriate for the jury to speculate on what may have happened to McFry and Burrows or what connection Chandler may have had with them. Proposed Instruction 15 stated that the jury may consider evidence relating only to Marlin Shuler and to Count Three of the indictment. Prior to the hearing, the district court, the prosecution, and Chandler's attorney discussed these proposed charges. The district court indicated that it thought that the charges unduly limited the evidence that the jury could consider because most of the evidence presented at the guilt phase was relevant to either Chandler's intent or to the planning or scheming of Shuler's murder. Then, in response to a question from the prosecution, the court opined that any evidence concerning the disappearance of either McFry or Burrows was relevant to planning, if nothing else. Later, the court advised that although he would not give Chandler's proposed instructions, he thought they were fair arguments for Chandler's counsel to make in closing.

At the hearing, the district court received, upon the government's submission, all of the testimony, evidence, and exhibits presented at the guilt phase that were relevant to the murder of Shuler or to the presence of aggravating or mitigating factors. Chandler's counsel, in his closing argument to the jury, requested that it should not speculate about any connection between Chandler and the disappearances of McFry and Burrows. The prosecution replied in rebuttal that the threats made against McFry and Burrows demonstrated planning in the protection of Chandler's marijuana operation. Following closing arguments, the court instructed the jury that it could consider any evidence relevant to the Shuler murder and to the existence of aggravating and mitigating factors. The court identified the specific factors that the government was attempting to prove and admonished the jury to consider no other aggravating factor.

On appeal, Chandler argues that the introduction of all the evidence from the guilt stage of the proceedings coupled with the argument made in closing by the government relating to McFry and Burrows constituted an attempt by the government to use the apparent murders of McFry and Burrows as aggravating factors. Since these putative murders were not included in the list provided under Section 848(h)(1)(B), Chandler insists that the sentence of death should be vacated.

The evidence relating to McFry and Burrows was not improperly admitted during sentencing because it related to the aggravating factors the prosecution was responsible for proving. Section 848(j) allows the presentation of any information relevant to aggravating circumstances provided the probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Although the Federal Rules of Evidence do not govern the admissibility of evidence during a Section 848(e) sentencing hearing it is helpful to refer to the definition of relevant evidence from the Federal Rules, to wit: evidence having any tendency to make the existence of a material fact more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

The evidence concerning McFry and Burrows has a tendency to prove Chandler's intent to kill Shuler and his substantial planning in the murder. The fact that Chandler threatened to eliminate two individuals who he believed were stealing his marijuana tends to prove that Chandler was willing to harm someone who threatened his marijuana enterprise. Since Shuler threatened Chandler's operation by informing on Donna Shuler, Chandler's prior threats and the disappearances have a tendency to prove that Chandler would also respond to Shuler's actions to protect his operation. This has a tendency to prove that Chandler intended to harm Shuler.

The evidence also demonstrates that Chandler planned the protection of his marijuana operation. Public statements indicating that Burrows is dead and McFry will be next, reveal Chandler's conscious actions over time to protect his operation. That Chandler planned the protection of his operation against those

who threatened it has some tendency to prove that Chandler would plan a reprisal against Shuler for informing.

We conclude that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. The evidence concerning McFry and Burrows was properly admitted at the guilt phase of trial[2], so the jury had previously considered the evidence. The district court instructed the jury that it could only weigh the evidence as it related to the three aggravating factors and that only those three factors could serve as the basis for imposition of a death sentence. Therefore, the evidence was not erroneously admitted during the sentencing hearing.

**6. Instruction on the weighing process**

Following the jury's finding of aggravating and mitigating factors, Section 848(k) provides that the jury "shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death." Chandler assigns error to the district court's failure to instruct the jury that it was required to find that the aggravating circumstances sufficiently outweighed any mitigating factors either beyond a reasonable doubt or by clear and convincing evidence. Chandler contends that because the possible punishment under Section 848 is the death penalty, the weighing process must be interpreted to require a heightened burden of proof.

The clear language of a statute controls any interpretation of the statute absent a clearly expressed legislative intent to the contrary. In this case, the language of Section 848(k) is clear and the meager legislative history is not to the contrary. The statute states that the jury must consider whether the aggravating factors sufficiently outweigh the mitigating factors to justify a sentence of death or if no mitigating factors exist whether the aggravating factors are themselves sufficient to justify a sentence of death.

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[2] *See infra* part III.C.1.

There is no language suggesting that the weighing process is governed by a burden of proof. Congress obviously knew how to assign burdens of proof to jury findings; it did so in Section 848(j) for findings of aggravating factors (beyond a reasonable doubt) and mitigating factors (by a preponderance of the evidence). If Congress had intended to govern the jury's weighing process with a burden of proof, it could have done so. It did not, and we will not construe the statute to require one.

That the jury need only be instructed that the aggravating factors sufficiently outweigh the mitigating factors is entirely appropriate. A capital sentencing scheme is constitutional even if it does not require that a specific burden of proof govern the jury's weighing process. *Ford v. Strickland*, 696 F.2d 804, 817-818 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). The Supreme Court has also observed, "we have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155 (1988) (plurality); *see Zant v. Stephens*, 462 U.S. 862, 875 n.13, 103 S.Ct. 2733, 2742 n.13, 77 L.Ed.2d 235 (1983). Congress created a constitutional capital sentencing scheme by requiring the jury to find that the aggravating factors sufficiently outweigh the mitigating factors before a death sentence could be recommended.

Alternatively, Chandler submits that even if the statute does not require a burden of proof in the weighing process, the district court erred in its instructions to the jury. The district court instructed the jury both at the beginning of the sentencing hearing, the preliminary instructions, and again at the conclusion, the supplemental jury instructions. On each occasion the district court provided the jury with a copy of the instructions that the district court requested the jury follow as the instructions were read aloud. Both the preliminary and the supplemental instructions discussed the weighing process five times. Three of those times the district court instructed that the aggravating factors must sufficiently outweigh the mitigating factors. Twice the district court instructed that the aggravating factors must

outweigh the mitigating factors. The district court also gave the jury a verdict form. The form was to be signed by each juror and confirmed that the jury had found that the aggravating factors sufficiently outweighed the mitigating factors.

We review jury instructions under the standard discussed above.[3] In context, the instructions sufficiently charged the jury on the weighing process. The instructions communicated to the jury that it must find that the aggravating factors when balanced against the mitigating factors justified a sentence of death. The fact that the district court omitted the word "sufficiently" two times does not render the instructions inadequate or erroneous. Moreover, the jury form that each juror signed stated that "the aggravating factors unanimously found by us to exist *sufficiently* outweigh any mitigating factor or factors found to exist to justify a sentence of death." RII221-3 (emphasis added).

**7. The weighing process**

A death penalty statute is constitutional only if the statue genuinely narrows the class of persons eligible for the death penalty and reasonably justifies the imposition of a more severe sentence on the defendant compared to others found guilty of murder. *Lowenfield v. Phelps*, 484 U.S. 231, 244, 108 S.Ct. 546, 554, 98 L.Ed.2d 568 (1988) (citing *Zant v. Stephens*, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983)).

Chandler argues that due to the breadth of 848(e), the finding of guilt under Section 848(e) does not satisfy the constitutional requirement that a capital statute must genuinely narrow the class of defendants eligible for the death penalty. Instead, Chandler contends that the narrowing function occurs during the sentencing phase when the jury finds aggravating factors. Chandler further contends that because one of the aggravating factors duplicates a jury finding at the guilt phase, the jury's weighing process is skewed in favor of imposing the death penalty. He submits that the jury's deliberations are skewed because the jury will

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[3] *See supra* part III.A.2.

inevitably consider the number of aggravating factors during its weighing process.

Section 848 establishes a two-step scheme that guides the jury's deliberations. At the guilt phase, the jury determines whether the defendant intentionally killed or commanded or procured the intentional killing of an individual while engaging in or working in furtherance of a continuing criminal enterprise. Before the death penalty can be recommended, the jury at sentencing must first unanimously find that the government has proved beyond a reasonable doubt the existence of aggravating factor (n)(1) and at least one other aggravating factor from the list in (n)(2) through (n)(12). Aggravating factor (n)(1) mirrors the intent element found at the guilt phase. The jury then considers whether the aggravating factors sufficiently outweigh any mitigating factors to justify a sentence of death. If no mitigating factors are found, the jury considers whether the aggravating factors are sufficient to justify a sentence of death.

As long as a death penalty statute narrows the class of persons subject to the death penalty at the guilt phase of trial, the fact that the jury may find an aggravating factor that duplicates a finding made at the guilt phase does not render the capital statute unconstitutional. *Lowenfield*, 484 U.S. at 246, 108 S.Ct. at 555. The statutory scheme of Section 848 satisfies the requirements of *Lowenfield*.[4] Initially, the statute requires the jury to find that

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[4] In *Lowenfield*, the jury, in convicting the defendant for first degree murder, found that the defendant had the specific intent to kill or to inflict great bodily harm upon more than one person. At sentencing, the jury then found, as the sole aggravating factor, that the defendant had knowingly created a risk of death or great bodily harm to more than one person. The Supreme Court determined that the statute narrowed the class of death eligible defendants at the guilt phase by narrowing the definition of a capital offense. *Id.* The Court found that a capital statute is constitutional if it narrows the class of death eligible defendants at the guilt phase and at sentencing allows for the consideration of mitigating circumstances and the exercise of discretion. *Id.* The

the defendant intentionally committed homicide in connection with large scale drug trafficking. The statute does not embrace anyone who committed murder, but only those who did so in connection with a continuing criminal enterprise. Thus, Section 848(e) sufficiently narrows the class of death eligible defendants at the guilt phase. Moreover, Section 848 requires that the jury find at least one other aggravating factor from the list of (n)(2)-(n)(12) before the death penalty can be imposed. The statute also requires the jury to consider any mitigating circumstances and allows the jury to weigh the aggravating and mitigating factors. This is all that *Lowenfield* requires.

Nevertheless, Chandler suggests that the present case is distinguishable from *Lowenfield* because Section 848(e) requires the jury to weigh the factors while the statute in *Lowenfield* did not. Chandler posits that the jury will be influenced in its weighing process by the number of aggravating factors. Although the Supreme Court has observed that the difference between a weighing statute and a non-weighing statute is "not one of 'semantics'", *Stringer v. Black* ___, U.S. ___, ___, 112 S.Ct. 1130, 1137, 117 L.Ed.2d 367 (1992), we have previously rejected the kind of argument Chandler now makes. *Johnson v. Singletary*, No. 93-2497, slip op. at 1925, 1930-31 (11th Cir. May 7, 1993) (per curiam). Further, any such distinction was erased by the district court's instructions. The court's instructions made clear that the weighing process was not a mechanical one and that different factors could be given different weight. Thus, the jury was adequately instructed that it should not reach a decision based on the number of aggravating or mitigating factors. Accordingly, the scheme of Section 848(e) was not improperly skewed towards a sentence of death.

**8. Prosecutor's closing arguments**

Chandler argues that the prosecutor made four improper remarks during closing argument at the sentencing hearing. We

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fact that an aggravating factor in such a scheme duplicates the jury's finding at the guilt phase was not dispositive.

apply a two-step test to determine if prosecutorial misconduct occurred: (1) the remarks must be improper and (2) the remarks must prejudicially affect the substantial rights of the defendant. *United States v. Eyster*, 948 F.2d.1196, 1206 (11th Cir. 1991). We find that the statements were proper and do not reach the second prong of the test.

**a. Improper vouching**

Following Shuler's murder, the police arrested Jarrell and his son, Billy Joe Jarrell. After Jarrell admitted to having killed Shuler, Billy Joe was released and the murder charges against him were dismissed. Jarrell entered into a plea agreement and testified for the government against Chandler. Both Billy Joe and Jarrell testified at Chandler's trial. Billy Joe denied involvement in Shuler's murder. At sentencing the parties stipulated that the murder charges against Jarrell and Billy Joe Jarrell had been or would be dismissed. Defense counsel then argued to the jury that the Jarrells had an independent motive to kill Shuler; that is, Shuler's abuse of Donna Shuler, Jarrell's half-sister.

Chandler contends that the prosecutor improperly vouched for the credibility of Billy Joe by alluding to evidence not before the jury. Chandler's counsel argued that the Jarrells were culpable for Shuler's death:

> Well here's one thing that is undisputed. There was Jarrell's family's malice toward Marlin Shuler. How is that demonstrated. No question about the fights that both sons, Charles Ray, Jr., Billy Joe had with Shuler. Why. Because of, number one, his abuse of Donna Shuler, Charles Ray's half sister, abuse of her, his abuse of the family generally and his abuse of Donna's mother, Mrs. Johnson, for whom he had an abhorrious name.

RXV-60. Counsel went on to argue, by alluding to the Jarrells, that a mitigating factor in this case was

> that another defendant or defendants equally culpable in the crime will not be punished by death. You can go further than that, not be punished at all, will not even be tried under an accusation of the murder of Marlin Shuler.

RXV-61.

In rebuttal the government argued that Charles Ray Jarrell was not as equally culpable as Chandler and then stated:

> Billy Joe Jarrell, there's a stipulation about his case being dismissed. That is absolutely correct. His case was dismissed for lack of evidence, for lack of evidence. And if you can find, ladies and gentlemen, from the evidence that you've heard in this trial that Billy Joe Jarrell is guilty of complicity in that murder whatsoever and can convince someone of that, me or Mr. Davis, then I'm sure that case will be brought up again.

RXV-73. Chandler objected to this argument.

A prosector's remarks are improper if they attempt to bolster the credibility of a witness based on the government's reputation or by alluding to evidence not formally before the jury. *Eyster*, 948 F.2d at 1206. Chandler argues that there was no evidence before the jury that the case against Billy Joe was dismissed for lack of evidence and, thus, the government's argument to that affect was improper. We disagree. Both parties stipulated that the charges against Billy Joe had been dismissed. A firearms expert testified at Chandler's trial that in his opinion the gun found on Billy Joe when he was arrested could not have fired the shots that killed Shuler. A police officer also testified that his investigation indicated that Billy Joe had not been involved in Shuler's murder. Therefore, there was sufficient evidentiary support for the prosecutor's argument.

**b. Failure to testify**

Chandler also contends that the government improperly commented on Chandler's failure to testify and, therefore, violated Chandler's privilege against self-incrimination. In arguing that Jarrell was less culpable than Chandler, the prosecution asserted:

> You've heard several times that in return for his cooperation in this case the government, the United States government and the State of Alabama have agreed to

> recommend a 25-year sentence without parole for Charles Ray Jarrell. . . .
>
> Now, the defendant will no doubt argue this simply is not somehow not [sic] fair. Charles Ray Jarrell came here before you and testified before you. You were able to hear his testimony. He came in here, admitted what he did, came in here and told you what he did, what kind of person he is and isn't anything to write home about, there is no question about that. But I submit to you that a man that was willing to solicit two different prospective killers on at least three different occasions, a man who was willing to provide money to people to perform the act, a man who was willing to provide weapons to complete the act and a man who is cunning and manipulative is a far more dangerous individual than a self-confessed town drunk living hand to mouth who allows himself to be manipulated into actually doing this terrible act.

RXV-56-57.

A prosecutor's statement improperly comments on a defendant's right not to testify if, when taken in the context in which the statement was made, it was manifestly intended, or was of such a character, that a jury naturally and necessarily would take it to be a comment on the failure of the accused to testify. *United States v. Herring*, 955 F.2d 703, 709 (11th Cir. 1992).

Viewed in the context in which the statement was made, we find that the prosecutor's statement was not improper. A common sense reading of the statement suggests that the prosecutor was arguing that Jarrell was not as culpable as Chandler. The argument was based, not on Chandler's failure to testify, but on the facts elicited from Jarrell's testimony. A jury would not naturally take the argument to be a comment on Chandler's failure to testify, nor is it obvious that the remark was so intended.

**c. Shifting of responsibility**

The prosecutor also argued:

> Now, you say you ask me to kill Ronnie Chandler. No, I don't ask you to do that. If you recommend the death

> sentence, Ronnie Chandler is killing himself by his actions. But if you do recommend the death penalty, the death penalty will be imposed by a judicial process where there was due process in an open proceeding where a jury had an opportunity to hear all of the evidence and decide what should be done with Ronnie Chandler.

RXV-74. The prosecutor also stated that recommending the death penalty is a form of self defense for society.

Chandler contends that these arguments are improper because they undermined the jury's sense of responsibility in recommending a death sentence, relying on *Caldwell v. Mississippi*, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 2637, 2639, 86 L.Ed.2d 231 (1985) and *Buttrum v. Black*, 721 F. Supp. 1268, 1316-17 (N.D. Ga. 1989). We disagree. The argument made here is not similar to those made in *Caldwell* and *Buttrum*. In this case, the prosecution emphasized that the jury was responsible for evaluating the evidence and determining whether Chandler's actions merited a death sentence. The argument does not in any manner attempt to dilute the jury's sense of responsibility. It urges the opposite. We also note that a prosecutor may argue that the death penalty serves as a deterrent. *Davis v. Kemp*, 829 F.2d 1522, 1528 (11th Cir. 1987), *cert. denied*, 485 U.S. 929, 108 S.Ct. 1099, 99 L.Ed.2d 262 (1988); *Drake v. Kemp*, 762 F.2d 1449, 1459-60 (11th Cir. 1985) (en banc), *cert. denied*, 478 U.S. 1020, 106 S.Ct. 3333, 92 L.Ed.2d 738 (1986). We conclude that the prosecutor's statements were proper.

**d. Argument against sympathy**

Chandler also contends that the government's argument that the jury should show no sympathy towards Chandler or his family amounted to prosecutorial misconduct. In prior habeas cases, we have found that it is improper for prosecutors to argue that mercy is *per se* inappropriate for the jury to consider in deliberating on a death sentence. *Wilson v. Kemp*, 777 F.2d 621, 626 (11th Cir. 1985), *cert. denied*, 476 U.S. 1153, 106 S.Ct. 2258, 90 L.Ed.2d 703 (1986); *Drake v. Kemp*, 762 F.2d at 1460. However, a prosecutor may properly argue that under the facts of the offense and the character and history of a particular defendant, the jury

should not extend mercy to that defendant. *Wilson*, 777 F.2d at 626.

In the present case, the prosecutor properly argued that because of the facts of this specific criminal activity, the jury should not base their decision of whether to sentence Chandler to death on any sympathy they might feel towards Chandler or his family. The argument was not improper.

**9. Future execution and the *Ex Post Facto* clause**

At the present time, there is no federal statute prescribing a method for carrying out federal death sentences. Chandler contends that any future Congressional legislation specifying a method of execution would have retroactive effect in violation of the *ex post facto* clause. U.S. Const. art. 1, §§ 9, cl. 3. In effect, Chandler argues that his current sentence is life imprisonment under a sentence of death. Once Congress acts, the punishment would increase to death.

The *ex post facto* clause prohibits any statute "which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed." *Collins v. Youngblood*, 497 U.S. 37, ___, 110 S.Ct. 2715, 2719, 111 L.Ed.2d 30 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68-69, 70 L.Ed. 216 (1925)). The clause does not prohibit a law that changes a statute's procedure, but does not affect matters of substance. *Dobbert v. Florida*, 432 U.S. 282, 293, 97 S.Ct. 2290, 2298, 53 L.Ed.2d 344 (1977) (new Florida capital statute that cured constitutional defects in old capital statute by amending the death sentencing procedure, but not the "quantum of punishment attached to the crime," did not violate *ex post facto* clause).

Chandler's attack is foreclosed by *Dobbert*. The statute under which Chandler was sentenced to death clearly provided for such a sentence, so there was clear notice that a violator of the law might be sentenced to death. Future legislation would not increase the punishment, but would only provide for the method by which

the punishment would be carried out; a change in procedure, not the sentence. Congressional legislation prescribing the method of execution would thus not increase the punishment imposed on Chandler.

**10. The sentence**

Chandler also complains that his present situation, in which he faces a death sentence without knowing when or how that sentence will be carried out, is cruel and unusual punishment in violation of the Eighth Amendment. Chandler relies on *In re Medley*, 134 U.S. 160, 10 S.Ct. 384, 33 L.Ed. 835 (1890). In *Medley*, a defendant was convicted and sentenced under a state capital statute that became effective after the commission of the murder. The new statute amended the previous capital statute in part by requiring a convicted defendant to be held in solitary confinement until execution, allowing the warden to fix the date of execution, and mandating that the prisoner be kept in ignorance of his execution date. The Supreme Court held that the new statute violated the *ex post facto* clause because it increased the defendant's punishment.

Because the Court's decision rested on *ex post facto* grounds, it provides no support for Chandler's arguments that his current situation is cruel and unusual punishment. We see no reason that his current sentence is unconstitutional. The majority of convicted murderers on death row do not know when they will be executed because of the lengthy appeal process as well as other reasons. Chandler's situation is no different from these individuals, or for that matter from most other people who do not know when their lives will end or in what manner.

**B. Challenges To The Conviction On Count Three**

Count Three of the indictment charged Chandler with the murder of Shuler while engaged in and working in furtherance of a continuing criminal enterprise in violation of 21 U.S.C. § 848(e). Chandler contends on several grounds that his conviction on this count was improper.

**1. Connection between the continuing criminal enterprise and the murder**

Section 848(e)(1)(A) states that

> any person engaging in or working in furtherance of a continuing criminal enterprise . . . who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

The government and Chandler agree that Section 848(e) requires a connection between the underlying continuing criminal enterprise and Shuler's murder in order for the Chandler to be convicted under this statute. Chandler contends, however, that his conviction should be reversed because the indictment failed to allege, and the district court's instructions did not require the jury to find, a connection between the murder and the enterprise. Chandler posits that these defects allowed the jury to return a guilty verdict based upon a finding that Chandler was involved in Shuler's murder contemporaneously with his involvement in the criminal enterprise even if the murder was unrelated to the enterprise. Chandler contends that the jury could have found that Chandler solicited Shuler's death because of Shuler's abusive treatment of his family, yet still return a guilty verdict on Count Three.

**a. The indictment**

The indictment charged in Count Three that Chandler:

> while engaged in and working in furtherance of a continuing criminal enterprise, intentionally killed and counseled, commanded, induced, procured and caused the intentional killing of Marlin Shuler, and such killing resulted, in violation of Title 21, United States Code, Section 848(e)(1)(A), and Title 18 United States Code, Section 2.

RII-221-Court Exhibit No. 1-12.

The indictment was sufficient because it did require a nexus between the enterprise and the murder of Shuler. An indictment may track the language of the statute "as long as 'those words of

themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished.'" *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *United States v. Ramos*, 666 F.2d 469, 474 (11th Cir. 1982).

The language of the indictment is sufficient. The indictment tracks the language of the statute as written by Congress. Moreover, any reasonable reading of the indictment makes it clear that the government was charging Chandler with a murder in connection with, and not just contemporaneous to, the ongoing continuing criminal enterprise. The necessary connection between the murder and the enterprise was thus present in the indictment.

**b. Jury charge**

The instruction given by the district court to the jury stated,

> "So count 3 is built upon count 2, which it is built upon count 1. Then goes on and charges on or about May 8, 1990 in or about an area known as Snow's Lake near Piedmont, Alabama in the Northern District of Alabama, the defendant . . . while engaged in and working in furtherance of a Continuing Criminal Enterprise, intentionally killed and counseled, commanded, induced, procured and caused the intentional killing of Marlin Shuler. . . .

RXIII-186. The district court further instructed that "Section 848(e)(1) make[s] it a separate Federal crime or offense for anyone, while engaging [in] a Continuing Criminal Enterprise such as the one charged in count 2, to kill an individual or to command or cause the intentional killing of an individual." *Id.* at 187. The court then enumerated the elements in a Section 848(e)(1) offense:

> First, that while engaging in or working in furtherance of the Continuing Criminal Enterprise charged in court [sic] 2, the defendant either killed Marlin Shuler or commanded, induced, procured or caused the intentional killing of Marlin Shuler, as charged in count 3 and (2), that the death of Marlin Shuler resulted from such activity of the defendant and, (3), that

such activity of the defendant was done knowingly and willfully.

*Id.* Again, Chandler argues that these instructions allowed the jury to return a guilty verdict even if they found no connection between the enterprise and Chandler's solicitation of Shuler's murder.

Chandler failed to request a jury instruction concerning the charge he now claims was erroneous nor did he object to the charge that was given. Thus, we review the charge for plain error. Fed. R. Crim. P. 52(b). The instructions are reviewed under the standard discussed above.[5]

The instructions informed the jury that Count Three, the murder charge, was "built upon" Count Two, the continuing criminal enterprise charge. The district court also instructed the jury that there must be a connection between the murder and the continuing criminal enterprise. The connection was described once as "while engaged in and in furtherance of" the enterprise and later stated as "while engaged in or in furtherance of" the enterprise. RXIII-186, 187. There is nothing vague about this clear and direct expression. Additionally, the prosecution introduced evidence and argued repeatedly that Chandler had solicited the murder of Shuler because Shuler had informed on one of Chandler's dealers.

There is no reasonable likelihood that the jury believed that it could find Chandler guilty even if it found that he solicited Shuler's murder for reasons not connected to the continuing criminal enterprise. The instructions clearly conveyed to the jury that it must find a connection between Shuler's murder and the enterprise. The mere use of the word "or" by the district court once during the jury instructions is exactly the type of "artificial isolation" that the Supreme Court rejected in *Cupp v. Naughten*, 414 U.S. at 147, 94 S.Ct. at 400.

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[5] *See supra* part III.A.2.

**2. Violation of 18 U.S.C. § 3432**

In any case in which a federal defendant is charged with a capital offense, at least three days before the commencement of trial, the prosecution must furnish the defendant with a copy of the indictment, a list of the veniremen and a list of the witnesses to be produced at the trial. 18 U.S.C. § 3432. On March 5, 1991, the government provided Chandler with a witness list. The list was supplemented on March 15, 1991.

The list did not include the name of Tim Whatley, a witness called by the prosecution. Whatley, an Anniston, Alabama, police officer, testified that in a search of Chandler's home he seized a piece of paper with the words "Bill Broome" and "copy of police report" on it.

Chandler contends that Whatley was improperly allowed to testify in violation of Section 3432. Chandler did not object when the government called Whatley as a witness, and objected to the admission of the piece of paper only on the grounds of "relevancy, materiality, and identification." RXI-36. Therefore, we review for plain error.

We first determine whether an error occurred and whether it was plain. The failure to include Whatley on the witness list was a technical violation of Section 3432, and it was an obvious error. Because this is an error that does not undermine the basic reliability of the trial process, Chandler must demonstrate that the error affected the outcome of the case.

Chandler cites *United States v. Crowell*, 442 F.2d 346, 348 (5th Cir. 1971). In *Crowell*, the prosecution in a capital case did not provide the defendant with a list of the veniremen. The court held that "Section 3432 is mandatory, and a defendant indicted for a capital offense must be given the benefits of its provisions, and the failure to allow defendant its benefits would be plain error." *Id.* at 348 (citation omitted).[6]

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[6] The *Crowell* court relied on two cases: *Amsler v. United States*, 381 F.2d 37 (9th Cir. 1967), and *Logan V. United States*,

We find that Crowell is distinguishable and that Chandler has not demonstrated that the error affected the outcome of his case. Chandler assigns as error the testimony of one police officer that the prosecution used to establish the chain of custody for the introduction of a piece of evidence. The officer's testimony was in no other respect important. Chandler makes no claim that his defense was in any way prejudiced by the failure to include Whatley's name on the government's witness list or that he was unaware that the government would attempt to introduce the piece of paper as evidence. Indeed, the government made the piece of paper available to Chandler pursuant to Fed. R. Crim. P. 16(a)(1)(C). Whatley had also written his name on the paper when it was seized. Thus, the purpose of Section 3432 as described in *Logan* was fulfilled because the defense was made aware that the government would attempt to link Chandler to the murder of Shuler in part through the piece of paper. Under the circumstances of this case, we find that the calling of Whatley as a witness for the government did not affect the outcome of Chandler's case.[7]

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144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892), *overruled* by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In *Amsler*, the prosecution in a capital case failed to provide the defendant with a list of either the veniremen or the prosecution's witnesses. In *Logan*, the government failed to provide the defendant with a list of witnesses. The Supreme Court in *Logan* stated that the predecessor statute to Section 3432 was "mandatory" and that "its purpose is to inform the defendant of the testimony which he will have to meet, and to enable him to prepare his defense." 144 U.S. at 304, 94 S.Ct. at 630.

[7] We further note that even had this error affected the outcome, the error does not seriously affect the fairness, integrity or public reputation of judicial proceedings, and we would not exercise our discretionary power to correct it. *See Olano*, ___ U.S. at ___, 113 S.Ct. at 1779.

**3. Lesser included offense**

Chandler challenges the absence of an instruction to the jury that it could find Chandler guilty of the lesser included offense of the use of interstate commerce facilities in the commission of a murder for hire, 18 U.S.C. § 1958, an offense that does not carry the possibility of a death sentence. Chandler did not request the lesser included offense instruction and did not object to the district court's omission of such an instruction.

The government may not statutorily preclude a defendant from seeking a lesser included offense instruction, if the evidence could support a finding of guilt on the lesser offense. *Beck v.Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). We have interpreted *Beck* as granting a defendant, who faces the possibility of a death sentence, the constitutional right to have a lesser included instruction read to the jury. *Rembert v. Dugger*, 842 F.2d 301, 303 (11th Cir.), *cert. denied*, 488 U.S. 969, 109 S.Ct. 500, 102 L.Ed.2d 536 (1988). In both *Beck* and *Rembert*, the defendant requested that the district court give a lesser included offense instruction. Here no such request was made.

The Court has also held that "[a]lthough the *Beck* rule rests on the premise that a lesser included offense instruction in a capital case is of benefit to the defendant, there may well be cases in which the defendant will be confident enough that the State has not proved capital murder that he will want to take his chances with the jury." *Spaziano*, 468 U.S. at 456, 104 S.Ct. at 3160. Other circuits have held that when a defendant fails to request a lesser included offense instruction in a capital case, the district court does not err in failing to instruct on the lesser included offense. *Kubat v. Thieret*, 867 F.2d 351, 365-66 (7th Cir.), *cert. denied*, 493 U.S. 874, 110 S.Ct. 206, 107 L.Ed.2d 159 (1989); *Look v. Amaral*, 725 F.2d 4, 8-9 (1st Cir. 1984).

We agree with the holding in *Kubat* that requiring a district court to give a lesser included offense instruction might be at odds with the trial strategy of defense counsel. Trial judges should be sensitive to and respectful of such difficult decisions made by counsel. Accordingly, we find that because Chandler did not request an instruction or object to the omission of an

instruction for the lesser included offense of murder for hire, the district court did not err by failing to give such an instruction *sua sponte*.[8]

**4. The offense in Count Three of the indictment**

Chandler argues that his conviction under Count Three of the indictment is invalid because Section 848(e) does not define an offense. instead, Chandler submits that Section 848(e) is merely a sentencing provision that authorizes the death penalty without proscribing conduct.

The Fifth Circuit has squarely rejected this argument, and the reasoning of that court is persuasive. *United States v. Villarreal*, 963 F.2d 725, 727-28 (5th Cir.) (rejecting claim that Section 848(e)(1)(B) does not define an offense), *cert. denied*, ___ U.S. ___, 113 S.Ct. 353, 121 L.Ed.2d 267 (1992). Section 848(e) sets forth the elements of the crime (any person engaged in a continuing criminal enterprise who procures the intentional killing of an individual), the *mens rea* (intent), and a separate penalty (20 years imprisonment to life, or the death penalty). Similarly, the conduct proscribed in Section 848(e) is referred to as an offense in subsections (g), (h), (i), (j), (n), and (p). We find Chandler's argument without merit.

**5. Appointment of additional counsel**

Chandler challenges the district court's failure to inform him of his right to have a second attorney appointed on his behalf pursuant to either 18 U.S.C. § 3005 or 21 U.S.C. § 848(q)(4). The time sequence of events in this case foreclose Chandler's claims. On December 13, 1990, the original indictment, which did not contain a capital charge against chandler, was returned. On December 20, 1990, the district court appointed counsel to represent Chandler. On January 7, 1991, L. Drew Redden entered his appearance as retained attorney of record for Chandler. The

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[8] We do not reach the issue of whether a violation of 18 U.S.C. § 1958 is a lesser included offense of 18 U.S.C. § 848(e).

appearance was filed with the court on January 10. On January 9, the superseding indictment was returned against Chandler, which included the capital charge.

18 U.S.C. § 3005 states:

> [w]hoever is indicted for . . . [a] capital crime shall be allowed to make his full defense . . . ; and the court . . . shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire . . . .

Chandler did not request the appointment of counsel after the superseding indictment was returned. Therefore, the district court did not violate Section 3005.

Section 848(q)(4)(A) provides that a defendant who is charged with a crime punishable by death, but is financially unable to retain counsel "shall be entitled to the appointment of one or more attorneys." By the time Chandler had been charged with a capital crime, he had already retained counsel. Therefore, the district court did not err in failing to appoint additional counsel under this section.

**C. Guilt Phase Challenges**

Chandler assigns a number of errors to the guilt phase of trial that he claims require the reversal of all the convictions.

**1. Admission of evidence concerning threats towards, and disappearance of, Burrows and McFry**

Chandler insists that the evidence concerning Chandler's threats against Patrick Burrows and Jeffrey McFry and their subsequent disappearance was improperly admitted during the guilt phase. Chandler argues that the evidence was irrelevant to the charges brought against him, and that its admission violated Fed. R. Evid. 404 and 403, and denied him due process. In effect, Chandler argues that the prosecution introduced this evidence in an attempt to demonstrate that Chandler was responsible for the deaths of these two individuals even though the government could not prove that they were in fact dead or, if they were, that Chandler had anything to do with their deaths.

The superseding indictment alleged that Chandler made threats against Burrows and McFry because he believed that they were stealing his marijuana. The indictment also alleged that after the threats were made, Burrows and McFry disappeared. Chandler moved to strike from the indictment both the alleged threats and disappearances. The magistrate judge stated that:

> Both parties announced satisfaction with the following ruling: The Government shall not inform the jury of the "disappearance" language that is contained within the paragraph cited. It is understood, however, that this shall not preclude the Government from offering evidence as to this.

RI-130. At a pretrial hearing held before the district court, the court, without objection, redacted the indictments to remove the allegations that Burrows and McFry had disappeared, but did not remove the allegations that Chandler had threatened Burrows and McFry.

During the trial the government introduced evidence that Chandler suspected Burrows and McFry were stealing marijuana from him, made threats against both Burrows and McFry, and announced that Burrows was dead and that McFry would be next. The government also introduced testimony that neither Burrows nor McFry had been seen since Chandler made these statements. Chandler objected to the introduction of testimony concerning the disappearance of Burrows and McFry once on hearsay grounds and once on unspecified grounds. However, after Chandler's hearsay objection, the prosecution reformulated the question and the witness testified that he had not seen Burrows since Chandler's threats, without objection by Chandler. The prosecution also introduced the testimony of another witness concerning the disappearance of McFry without drawing an objection from Chandler. At no time did Chandler object during trial and argue that the evidence concerning the disappearances of McFry and Burrows was improper for the reasons he now argues on appeal. Therefore, we review for plain error.

The evidence concerning Chandler's threats against Burrows and McFry is relevant to the charges that were brought against Chandler. Chandler was charged with supervising a continuing

criminal enterprise whose goal was the trafficking of marijuana. Evidence is relevant if it has

> any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 401. Certainly, evidence that Chandler threatened individuals whom he believed were stealing marijuana and that they subsequently disappeared is relevant in proving that Chandler had a proprietary interest in a large marijuana operation. The obvious implication of such threats and disappearances is that Chandler had some personal stake that was affected by the marijuana thefts of Burrows and McFry. The threats and the disappearances also demonstrate Chandler's willingness to protect his marijuana operation through at least the threat of violence. The threats become more credible when viewed in conjunction with the disappearance of those he threatened.

The evidence does not violate Fed. R. Evid. 404. Rule 404 prohibits the introduction of propensity evidence; that is, evidence that demonstrates solely that because the defendant engaged in some other "bad act," the defendant is likely to have engaged in the currently charged illegal act. *United States v. Dothard*, 666 F.2d 498, 501 (11th Cir. 1982). However, Rule 404 does not proscribe evidence of criminal activity other than the charged offense "if it is an uncharged offense that arose out of the same transaction or series of transactions as the charged offense, if it was inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime of trial." *United States v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983) (per curiam) (citations omitted). The evidence of Chandler's threats towards Burrows and McFry and their subsequent disappearances is an uncharged offense that arose from the same transaction as the charged offense. The evidence is also necessary to complete the story of the crime. The threats were actions taken by Chandler to further his marijuana trafficking operation, particularly where the credibility of the threats was enhanced by the disappearances. This evidence was properly admitted. *See United States v. Leavitt*, 878 F.2d 1329,

1339 (11th Cir.) (act in furtherance of conspiracy is not extrinsic evidence because it is necessary to complete story of the charged offense), *cert. denied*, 93 U.S. 968, 110 S.Ct. 415, 107 L.Ed.2d 380 (1989).

The evidence also does not violate Fed. R. Evid. 403. Evidence may be excluded under Rule 403 only when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." However, we have cautioned, that Rule 403 is an extraordinary remedy that should be used only sparingly since it permits the trial court to exclude concededly probative evidence. *United States v. Terzado-Madruga*, 897 F.2d 1099, 1117 (11th Cir. 1990). We see no reason to employ this sparing remedy. The evidence is probative in establishing Chandler's role in the conspiracy and criminal enterprise and in illuminating Chandler's attempt to protect his operation. Further, we find nothing "unfair" in the prejudice this evidence causes to Chandler. The evidence was properly admitted under Rule 403.

Finally, we reject Chandler's claim that the admission of this evidence denied him due process. Chandler relies on cases in which a verdict or sentence was based on material misinformation. *See Johnson V. Mississippi*, 486 U.S. 578, 590, 108 S.Ct. 1981, 1989, 100 L.Ed.2d 575 (1988); *United States v. Rodriguez*, 765 F.2d 1546, 1555 (11th Cir. 1985). In the present case, Chandler has not shown that the jury was presented with any material misinformation. In fact, several witnesses testified concerning Chandler's threats and the disappearances of Burrows and McFry. The credibility of Chandler's remarks and his mode of operation was obviously enhanced by the knowledge of the disappearances of the two individuals.

In conclusion, the district court committed no error in admitting the evidence concerning the threats made by Chandler towards McFry and Burrows and their subsequent disappearances.

**2. *Batson* challenge**

Chandler contends that the prosecution impermissibly exercised its peremptory challenges by striking black jurors

because of their race in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Chandler requests that the case be remanded so that the district court may conduct a hearing to establish the prosecution's motive for striking the black jurors from the panel.

The original venire contained 77 persons. After challenges for cause and other excuses, the venire contained 57 jurors, 13 of which were black.[9] The prosecution used 19 of its 20 peremptory challenges; 10 of the 19 were used to strike black jurors. The defense also struck one black juror. The jury that was empaneled contained two black members.

But Chandler did not object to the prosecution's strikes during *voir dire*. Chandler raised the *Batson* claim in his motion for a new trial filed one week after the trial. The district court found the motion untimely and noted that chandler had failed to make out a *prima facie* case of purposeful discrimination. We agree with the district court that Chandler's objection was untimely. The failure to make a timely *Batson* objection to the prosecution's use of peremptory challenges results in a waiver of the claim. *United States v. Cashwell*, 950 F.2d 699, 704 (11th Cir. 1992). An objection is timely if it is made during *voir dire*. *Id.*; *see also, Clark v. Newport News Shipbuilding & Dry Dock Co.*, 937 F.2d 934, 938-40 (4th Cir. 1991); *United States v. Dobynes*, 905 F.2d 1192, 1196 (8th Cir.), *cert. denied*, 498 U.S. 877, 111 S.Ct. 206, 112 L.Ed.2d 167 (1990); *United States v. Romero-Reyna*, 867 F.2d 834, 836-37 (5th Cir. 1989). Chandler failed to object in a timely manner and thus waived his *Batson* claim.

**3. Juror challenges for cause**

Chandler contends that the district court erred in refusing to strike four jurors for cause. We review for an abuse of discretion, mindful that there are few aspects of a jury trial where we would

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[9] The government claims that there were 58 jurors in the venire.

be less inclined to disturb a trial judge's exercise of discretion. *United States v. Teqzes*, 715 F.2d 505, 509 (11th Cir. 1983).

A party challenging a juror for cause must demonstrate that the juror in question exhibited actual bias by showing either an express admission of bias or facts demonstrating such a close connection to the present case that bias must be presumed. *United States v. Khoury*, 901 F.2d 948, 955, *modified*, 910 F.2d 713 (11th Cir. 1990). A juror who would automatically vote for the death penalty in every case must be removed for cause because that juror will fail to consider the aggravating and mitigating evidence as the instruction [sic] require her to do. *Morgan v. Illinois*, ___ U.S. ___, ___, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492 (1992).

Chandler argues that four jurors should have been removed for cause.

**a. Jurors Frye and Landers**

Chandler argues that jurors Frye and Landers should have been excused because both indicated that they would impose the death penalty if Chandler was found guilty. Reading the entirety of their responses at *voir dire*, it does not appear that the district court abused its discretion by not striking these jurors for cause. The answers make it clear that while Frye and Landers were proponents of the death penalty, they would not automatically vote for the death penalty if they found Chandler guilty of murder.

Chandler also argues that Landers should have been removed for cause because he was overheard telling other jurors that "[t]he way to get off this case is to say the defendant looks guilty." RIV-312. Although informed of Landers's remark by the district court, defense counsel did not explore the statement during *voir dire* questioning of Landers. The district court held that this incident did not make it "totally improper" for Landers to serve on the jury and rejected Chandler's motion to strike Landers for cause. Most jurors are aware that they can avoid jury duty by claiming a lack of impartiality. The statement does not demonstrate that Landers was biased against Chandler. Thus, the

district court did not abuse its discretion in refusing to remove Landers for cause.

**b. Juror Tuggle**

Chandler argues that juror Tuggle should have been excused because he was biased against drug activity. During *voir dire*, Tuggle stated that he had a son-in-law who was in jail because marijuana and possibly some other articles were found in his son-in-law's car. The juror's response to the district court's questions do not demonstrate that the [sic] Tuggle would be biased against a defendant prosecuted for marijuana distribution. Therefore, the district court did not abuse its discretion refusing to remove Tuggle for cause.

**c. Juror Grimes**

Chandler argues that juror Grimes should have been excused because she would not consider some of the statutory mitigating factors in reaching her conclusion on the appropriateness of sentencing Chandler to death. During *voir dire*, Grimes stated that she did not have strong feelings towards the death penalty one way or the other. However, she also stated that she did not believe that the defendant's age and past criminal history would affect her recommendation for or against a death sentence. Both of these factors are mitigating factors as defined in Section 848(m).

In *Morgan*, the Supreme Court asserted that:

> [a]ny juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.

___ U.S. at ___, 112 S.Ct. at 2235. Grimes's answers do not raise the primary concern of *Morgan:* that a juror who would automatically recommend a penalty of death regardless of any mitigating evidence. The statement that she would not consider two of the statutory mitigating factors was made in response to defense counsel's questions and in ignorance of the mandates of Section 848. Jurors are not expected to know the law prior to

being properly instructed. More important, Grimes stated that she would follow the district court's instructions in arriving at her decision. The district court thus did not abuse its discretion in finding that Grimes would be able to follow the court's instructions.

In conclusion, we find that the district court did not abuse its discretion in refusing to excuse for cause these four jurors.

**4. Recusal denied**

Chandler argues that the district court erred in denying chandler's motion for recusal. In an order denying Chandler's pretrial motion to strike the death penalty from the indictment, the district court stated

> [b]ased on the evidence the court has heard during the trial of [Chandler's] codefendants, this court is satisfied that the government has properly exercised prosecutorial discretion in not also seeking the death penalty for [Jarrell]. Jarrell was an alcoholic lackey for Chandler who for $500, or maybe simply a fifth of liquor, likely would have done anything Chandler directed him to do.

RI-201-3.

Chandler suggests that this holding demonstrates that the district court's lack of impartiality and the necessity of recusal. We review the district court's denial of a motion to recuse for an abuse of discretion. *McWhorter v. City of Birmingham*, 906 F.2d 674, 678 (11th Cir. 1990) (per curiam).

A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The test under Section 455(a) is whether an objective, disinterested, lay observer fully informed of the facts on which recusal was sought would entertain a significant doubt about the judge's impartiality. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989). However, we have held that a "judge's bias must be personal and extrajudicial; it must derive from something other than that which the judge learned by

participating in the case." *McWhorter*, 906 F.2d at 678. Likewise, a judge's rulings in a related case may not ordinarily serve as the basis for recusal. *Id.* There is an exception to this general rule when the movant demonstrates pervasive bias and prejudice. *Id.*

In his order denying Chandler's motion, the district judge articulated that his comment concerning the relative culpabilities of Jarrell and Chandler was based on the evidence the court had heard during the trials of Chandler's codefendants. This is the only comment cited by Chandler, and the comment was not extrajudicial. Moreover, although Chandler argues that the district judge's pervasive bias is demonstrated by the admission of evidence of uncharged and unproven crimes, his repeated denials of the defense's jury instructions, and his imposition of the maximum sentences possible for the non-capital convictions, these decisions are just a few of the many decisions that a district judge is called upon to make in the course of a trial and fail to demonstrate pervasive bias and prejudice. Thus, the district judge did not abuse his discretion in denying Chandler's motion for recusal.

**5. Change of venue and sequestration of the jury**

Chandler claims that the widespread publicity before the trial prejudiced the jurors in his case. There were 64 articles in five different newspapers during the five months prior to trial. Some of the coverage suggested that Chandler was responsible for the deaths of McFry and Burrows. During *voir dire*, seven venirepersons stated that they had some knowledge of the case. Of the seven, six said that they would still afford Chandler a fair trial and the seventh did not remember what he had heard about the case. None of the seven were empaneled.

The district court's denial of the motion for change of venue and for sequestration of the jury is reviewed for an abuse of discretion. *United States v. Lehder-Rivas*, 955 F.2d 1510, 1524 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992). Chandler alleges no facts, outside the press coverage mentioned above, showing that any of the jurors had been prejudiced by the pretrial publicity. Regarding the sequestration motion, the district court found that the publicity

at that point was limited, but reserved the right to reconsider the motion if publicity increased later in the trial. We find that Chandler has not demonstrated that the publicity surrounding the trial was such that the district court abused its discretion in denying Chandler's motions for change of venue and for sequestration of the jury.

**D. Challenges To Convictions And Sentences On Other Counts**

**1. Continuing criminal enterprise conviction, Count Two**

Count Two of the indictment charged Chandler with engaging in a continuing criminal enterprise in violation of Section 848(a) by committing a series of violations of 21 U.S.C. §§ 841, 843(b) and 846. Chandler argues that the district court's instruction erroneously suggested that district court had already determined Chandler's guilt on these charges. Upon review of the district court's charge, we disagree and find that the district court properly instructed the jury as to Count Two.

**2. Conspiracy conviction, Count One**

Chandler argues, and the government concedes, that his conspiracy conviction should be vacated. When a defendant is convicted and sentenced on a Section 846 conspiracy count and a Section 848 continuing criminal enterprise count, the two offenses are merged by vacating the conviction and sentence of the lesser included Section 846 conspiracy. *United States v. Nixon*, 918 F.2d 895, 908 (11th Cir. 1990). We have sustained Chandler's continuing criminal enterprise conviction and, therefore, vacate Chandler's conspiracy conviction and sentence.

**3. Firearms conviction, Count Four**

Count Four charged Chandler with aiding and abetting the use or carrying of a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c). Chandler argues that there was insufficient evidence to support the jury's guilty verdict. Sufficiency of the evidence is a question of law subject to *de novo* review. *United States v. Poole*, 878 F.2d 1389, 1391 (11th Cir. 1989) (per curiam). This court must view the evidence in the

light most favorable to the government and determine whether a reasonable jury could have found defendant guilty beyond a reasonable doubt. *United States v. Crawford*, 906 F.2d 1531, 1535 (11th Cir. 1990).

To prove a 18 U.S.C. § 924(c) violation, possession of the firearm must be an integral part of, and facilitate the commission of, the drug trafficking offense. *Poole*, 878 F.2d at 1393. At trial the government introduced evidence that Chandler recruited Raymond Pointer to transport marijuana from Piedmont, Alabama, to Anniston, Alabama, and provided Pointer with a car for that purpose. Pointer made three or four trips to Anniston. The prosecution then engaged in the following examination:

> Q. Okay. And did you after you picked up this Oldsmobile, did you make any runs from Piedmont to Anniston with this Oldsmobile?
>
> A. Yes, sir.
>
> Q. Okay. Now, did you have an occasion on these runs to receive anything else from Ronald Chandler to keep with you on these runs?
>
> A. Just that gun.
>
> Q. Did he give you a gun?
>
> A. Yes, sir.
>
> Q. When did he give you a gun, as best you can recall?
>
> A. I think it was two, maybe three days after he give me the car.

RVII-71-72.

Considering the testimony in its context, we find that there was sufficient evidence to support the Chandler's conviction on the firearm charge. The evidence, viewed in a light most favorable to the government, shows that Chandler gave Pointer a gun when Pointer was given the marijuana to transport to Anniston. A reasonable jury could have found beyond a reasonable doubt that the possession of the firearm was an integral part of, and facilitated, the drug trafficking, particularly

in the context of other, substantial testimony at trial regarding the on-going criminal enterprise.

**4. Money laundering, Count Seven**

Chandler challenges the district court's instruction to the jury on Count Seven and seeks the reversal of his conviction. Count Seven charged Chandler with money laundering through the purchase of real estate in Cleburne County, Alabama. Count Eight charged Chandler with money laundering through the purchase of real estate in Calhoun County, Alabama. Chandler argues that the court charged the jury twice on Count Eight and did not charge the jury on Count Seven.

During the jury instructions, the district court incorrectly stated that the property charged in Count Seven was located in Calhoun County, Alabama. Shortly thereafter, the court correctly stated that the property was located in Cleburne County. The district court also instructed the jury that Count Eight was "an identical-type offense as Count Seven" except that the date was different and the property in Count Eight was "in Calhoun County rather than Cleburne County." Significantly, the district court gave the jury a copy of the indictment, which accurately identified the property locations.

Chandler failed to object to the district court's instruction. Hence, the district court's error is reviewed for plain error. Given the district court's subsequent correct statement of the property's location and the fact that the jury received a copy of the indictment, the district court's instruction was not erroneous.

**5. Money laundering, Counts Eight and Nine**

Chandler contends that the evidence was insufficient to support the money laundering charges in Counts Eight and Nine. Counts Eight and Nine charged Chandler with money laundering through the purchases of two pieces of real estate. Both convictions are reviewed for sufficiency of the evidence under the standard set forth above.

The evidence at trial showed that Chandler's parents held the titles to both parcels. With respect to Count Eight, the

government introduced evidence that Chandler paid taxes on the property and discussed drainage problems with municipal officials concerning the land. With respect to Count Nine, the government introduced evidence that, although his father paid the money to the sellers and received title to the land, Chandler stated that he had purchased the 120 acres. The evidence also showed that Chandler exercised control over the two properties by growing and cultivating marijuana on the properties and by having others guard the tracts. Viewed in the light most favorable to the government, there was sufficient evidence to support the jury's finding, beyond a reasonable doubt, that Chandler laundered money through purchasing the two real estate parcels.

**6. Sentencing on the non-capital counts**

Chandler first argues that we must remand the case to the district court for resentencing because the district court failed to afford him a sufficient opportunity to object to the sentence as required under *United States v.* Jones, 899 F.2d 1097, 1102-03 (11th Cir.), *cert. denied*, 498 U.S. 906, 111 S.Ct. 275, 112 L.Ed.2d 230 (1990). However, after imposing the sentences, the district court specifically asked counsel if there were any objections other than those that had been raised during the sentencing hearing. Chandler's claim is without merit.

Chandler also argues that the district court improperly calculated his offense level on the conspiracy and continuing criminal enterprise counts. Since we have vacated Chandler's conviction on the conspiracy count, we address only the challenge to the criminal enterprise sentence. At sentencing, the district court adopted the presentence report's recommendation for the offense level on the continuing criminal enterprise counts. The report noted that the offense level for these counts is 38. U.S.S.G. § 2D1.5. However, the report stated that the offense level should be adjusted to take into account relevant conduct with respect to the enterprise pursuant to Section 1B1.3. The relevant conduct was the murder of Shuler. Thus, as Section 2A1.1(a) assigns an offense level of 43 to first degree murder, Chandler's offense level was fixed at 43, resulting in a life sentence.

Chandler contends that the district court's computation resulted in the double counting of Shuler's murder, once in the continuing criminal enterprise count and again as the basis for the death sentence under the Section 848(e) count, Count Three. Under the circumstances of this case, we do not reach the merits of Chandler's claim. He faces a sentence of death on Count Three, and the life sentence on Count Two adds no further punishment.

Finally, Chandler argues that the district court erred in holding that the drug activity encompassed in the conspiracy and continuing criminal enterprise counts included more than 3,000 but less than 10,000 marijuana plants. We review the district court's findings of fact under the clearly erroneous standard. *United v. Howard*, 923 F.2d 1500, 1503 (11th Cir. 1991). During the trial, witnesses testified that Chandler planted several thousand marijuana plants. A notebook seized from a co-conspirator and Chandler's own statement also supported the finding that Chandler planted more than 3,000 marijuana plants. Thus, the district court's finding that Chandler cultivated more than 3,000 marijuana plants was not clearly erroneous.

## IV. CONCLUSION

We **VACATE** Chandler's conviction and sentence for conspiracy, Count One, because the count merges into the continuing criminal enterprise conviction, Count Two. We AFFIRM Chandler's convictions and sentences on Counts Two through Nine, including his death sentence.

**EDMONDSON, Circuit Judge, concurs in the result.**

**UNITED STATES of America,**
**Plaintiff-Appellee,**

**v.**

**David Ronald CHANDLER, a/k/a Ronnie Chandler, Defendant-Appellant.**
**Nos. 91-7466, 91-7577.**

United States Court of Appeals,
Eleventh Circuit.
Sept. 30, 1993.

Appeal from the United States District Court for the Northern District of Alabama; James Hughes Hancock, Judge.

Before FAY, EDMONDSON and BIRCH, Circuit Judges.

BY THE COURT:

Appellee's, United States of America, motion for modification of the panel's opinion is GRANTED. On page 2720 of the slip opinion, the second sentence of the first full paragraph of the second column [996 F.2d 1073, on page 1095, the second sentence of the last paragraph of the second column]: "Thus, Congress must enact such a statute before Chandler may be executed" is hereby stricken.

Adm. Office, U.S. Courts--West Publishing Company, Saint Paul, Minn.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**Nos. 91-7466 and 91-7577**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID RONALD CHANDLER,
a/k/a Ronnie Chandler,

Defendant-Appellant.

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On Appeal from the United States District Court for the
Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: FAY, EDMONDSON and BIRCH, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

[Filed Sept. 30, 1993]

**UNITED STATES DISTRICT COURT**

**Northern District of Alabama**

**UNITED STATES OF AMERICA**

**v.** **Case Number CR 90-H-266-E**

**DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER**

**Defendant.**

**JUDGMENT IN A CRIMINAL CASE**

**(For Offenses Committed On or After November 1, 1987)**

The defendant, DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER, was represented by L. Drew Redden.

The defendant was found guilty on count three after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count, involving the following offense:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 USC 848(e)(1)(A) | Continuing criminal enterprise embracing procurement of the killing of an individual | 10/1/90 | 3 |

As pronounced on May 14, 1991, the defendant is sentenced as provided in page 2 of the Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The sentence is also imposed pursuant to 21 USC 848, including particularly 848(l).

It is ordered that the defendant shall pay to the United States a special assessment of $50.00 for count three, which shall be due immediately.

Signed this the 14th day of May, 1991.

_____

United States District Judge

Defendant's SSAN: 423-80-9130

Defendant's Date of Birth: 12/19/52

Defendant's address: Route 2, Box 473-E, Piedmont, AL 36272

**Defendant: DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER**
**Case Number: CR 90-H-266-E**

## SENTENCE

Based upon the Special Findings and Recommendations of the jury on April 3, 1991, under Count 3, the court hereby imposes upon the defendant a sentence of death. The defendant will be remanded to the custody of the Bureau of Prisons with directions to cause such death sentence to be implemented.

Implementation of such sentence is hereby STAYED until such stay is lifted by an order of this court, or by the United States Court of Appeals for the Eleventh Circuit or by the United States Supreme Court.

The filing of a notice of appeal shall also terminate such stay, but the stay provided for in F.R.Cr.P. Rule 38(a) shall become effective.

The court declines to impose a fine due to the defendant's inability to pay.

## RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy Marshal

**UNITED STATES DISTRICT COURT**

**Northern District of Alabama**

**UNITED STATES OF AMERICA**

**v.** **Case Number CR 90-H-266-E**

**DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER**

**Defendant.**

## JUDGMENT IN A CRIMINAL CASE

**(For Offenses Committed On or After November 1, 1987)**

The defendant, DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER, was represented by L. Drew Redden.

The defendant was found guilty on count(s) 1, 2, 4, 5, 6, 7, 8 and 9 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 21 USC 846 | Drug conspiracy or attempt to distribute controlled substance | 10/90 | 1 |
| 21 USC 841(a)(1) | - Schedule I (marijuana); controlled substance<br>- Schedule I (marijuana) | | |
| 21 USC 848 | Controlled sub. - Sch. I (marijuana); continuing criminal enterprise | 10/90 | 2 |
| 18 USC 924(c)(1) | Firearms - used to commit offense | 5/90 | 4 & 5 |
| 18 USC 1956(a)(1)(A) | Laundering of monetary instruments | 3/90 | 6 |
| 18 USC 1956(a)(1)(B)(i) | Laundering of monetary instruments | 10/89 | 7, 8 & 9 |

As pronounced on May 14, 1991, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00 for each of count(s) 1, 2, 4, 5, 6, 7, 8 and 9, for a total of $400.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 14th day of May, 1991.

_____

United States District Judge

Defendant's SSAN: 423-80-9130

Defendant's Date of Birth: 12/19/52

Defendant's address: Route 2, Box 473-E, Piedmont, AL 36272

**Defendant: DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER**
**Case Number: CR 90-H-266-E**

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for the balance of the defendant's life, under Count 2; said sentence to run CONCURRENTLY with any custody served under, or in connection with the separate sentence imposed under Count 3.

Under Count 1, the defendant is to be imprisoned for the balance of the defendant's life; said sentence to run CONCURRENTLY with any custody served under, or in connection with the sentences imposed under Counts 2 and 3.

Under Counts 6, 7, 8, and 9, SIX (6) YEARS custody, to run CONCURRENTLY with any custody served under, or in connection with the sentences imposed under Counts 1, 2 and 3.

Under Count 4, FIVE (5) YEARS custody, to run CONSECUTIVELY to any custody served under, or in connection with the sentences imposed under Counts 1, 2, 3, 6, 7, 8 and 9.

Under Count 5, FIVE (5) YEARS custody, to run CONSECUTIVELY to any custody served under, or in connection with the sentences imposed under Counts 1, 2, 3, 4, 6, 7, 8 and 9.

### RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal

By_____
Deputy Marshal

**Defendant: DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER**
**Case Number: CR 90-H-266-E**

## SUPERVISED RELEASE

Upon release from the custodial portion of the sentences imposed under Counts 1, 2, 4, 5, 6, 7, 8 and 9, the defendant shall be on supervised release for a term of FIVE (5) YEARS.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

– CONTINUED –

**Defendant: DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER**
**Case Number: CR 90-H-266-E**

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. The defendant shall not leave the judicial district without the permission of the court or probation officer.

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4. The defendant shall support his or her dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

**Defendant: DAVID RONALD CHANDLER a/k/a RONNIE CHANDLER**
**Case Number: CR 90-H-266-E**

## STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

**Guideline Range Determined by the Court:**

| | |
|---|---|
| To Offense Level: | 43 |
| Criminal History Category: | I |
| Imprisonment Range: | Life |
| Supervised Release Range: | 5 years |
| Fine Range: | $ 25,000.00 to $ 4,000,000.00 |
| Restitution: | $ 0 |

The court declines to impose a fine due to the defendant's inability to pay.

The sentence imposed under Counts 1, 2, 4, and 5 is the guideline sentence.

The sentence imposed under Counts 6, 7, 8 and 9 is within the guideline range.

**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION**

UNITED STATES OF AMERICA )
VS. ) CR90-H-266-E
DAVID RONALD CHANDLER, A/K/A )
RONNIE CHANDLER

ORDER

Pursuant to the April 19, 1991 order the April 8, 1991 motions of David Ronald Chandler for a new trial and for a new trial on the penalty phase under Count Three are now under submission.

The motion for new trial raises numerous grounds in twenty-six separately numbered paragraphs. Only the grounds embodied in paragraphs 10, 11, 12 and 26 need be discussed. The remaining grounds either raise matters which have earlier been argued to and rejected by the court or raise matters which have no merit and the reasons for rejecting them are self-evident.[1] Those four grounds are bottomed upon *Batson v. Kentucky*, 476 U.S. 74 (1986) and *Powers v. Ohio*, ___ U.S. ___ (No. 89-5011, April 1, 1991). *Batson* teaches that a defendant's right to equal protection proscribes purposeful racial discrimination in jury selection. And *Powers* teaches that this right belongs to a defendant even though the defendant and the excluded juror do not share the same race.

A trial court is not required to demand *ex mero motu* from the government a nondiscriminatory explanation for the exercise of each peremptory challenge. Rather a defendant is required to raise the issue and establish a *prima facie* case of purposeful discrimination before the prosecution is required to provide a

---

[1] Paragraph 22 adopts all grounds embraced in the separate motion for new trial on the penalty phase under Count Three. That motion will be treated separately in this order.

racially neutral explanation for the allegedly discriminatory challenge. In this case the defendant never raised a *Batson* issue at any time prior to the filing of his motion for new trial and certainly never established a *prima facie* case of purposeful discrimination during the jury selection process. The holding in *Powers* is not novel and is, at most, a logical extension of *Batson* and *Swain v. Alabama*, 380 U.S. 202 (1965). The concept has been the subject of a number of decisions of federal appeals courts, and the January 22, 1990 opinion in *Holland v. Illinois*, 493 U.S. 474 (1990), certainly suggests that the question which *Powers* answered was a viable, unresolved question as viewed by some of the justices on January 22, 1990. See *United States v. Rodriguez*, 917 F.2d 1286, 1288 (f.n. 5) (11th Cir. 1990). Any error associated with the exercise of peremptory challenges in this case does not rise to the level of "plain error" so as to be within the purview of F.R.Cr.P. Rule 52(b). See *United States v. Young*, 470 U.S. 1 (1985). Defendant has thus waived any objection to the government's exercise of peremptory challenges. *United States v. Romero-Reyna*, 867 F.2d 834, 836-37 (5th Cir. 1989) (to be timely a *Batson* objection must be raised before venire is dismissed and before the trial begins); *United States v. Erwin*, 793 F.2d 656, 667 (5th Cir. 1986), *cert. denied*, 479 U.S. 991 (1986). Also see *United States v. Rodriguez, supra.*

While the striking of any black person for racial reasons violates the Equal Protection Clause even though other blacks are seated as jurors, where, as here, a defendant has waived any *Batson* challenge it is at least comforting to observe that the twelve seated jurors who decided this case included two black persons. Thus, 16.6% of the jury was black, which is slightly greater than the black-white ratio of this court's pool of qualified jurors from which subject jurors were called. That pool is 15.9% black, 83.0% white and 1.1% other.[2] Further the government failed to utilize all its peremptory challenges. Certainly these facts negate any arguable inference that the prosecutor used peremptory challenges to exclude a venire member from the jury on account

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[2] See the certification of the jury clerk filed April 22, 1991.

of his or her race. Without such an inference from the totality of the circumstances surrounding the jury selection, there is no *prima facie* case of purposeful discrimination. While the court is not required at this time to consider the explanation of the prosecutor contained in his April 29, 1991 affidavit setting forth the reasons for each peremptory challenge of a black venire member,[3] each reason given certainly reflects a racially neutral explanation of each challenge. Where, as here, it is not shown and cannot fairly be said that racial considerations infected the jury, "it is incumbent upon (a reviewing court) to disregard errors which cannot ultimately affect the outcome of the case." *United States v. Bennett*, 928 F.2d 1548, 1553 (f.n. 8) (11th Cir. 1991). In *Bennett* the court held as harmless error the seating of a juror where the trial court had incorrectly found legitimate the government's articulated reason for exercising a peremptory challenge of a black venire member.

Having considered the April 8, 1991 motion for a new trial, the motion is DENIED.

In the April 8, 1991 separate motion for a new trial on the penalty phase under Count Three, defendant raises several additional grounds, most of which have heretofore been argued to the court either prior to trial (e.g., the March 4, 1991 order addressing the motions to strike and to dismiss) or during the trial and on the record (e.g. during charge conferences and while hearing objections to the court's charges). Defendant does introduce a new, and rather novel ground. Defendant argues that the mode of implementing a death penalty is an integral component of the sentence itself, and since Congress authorized the imposition of a death penalty without providing the *quo modo*, there is a "statutory gap" in the legislation authorizing a sentence of death. The court disagrees. Quite clearly, unless and until Congress does provide the *quo modo* for implementation of the sentence of death, it cannot be implemented. But future legislation bridging the "statutory gap" cannot seriously be argued

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[3] Defendant is not questioning challenges of white members of the venire based upon their race.

as increasing the penalty and will not violate the constitutional prohibition against *ex post facto* laws. Having also considered the April 8, 1991 motion for a new trial on the penalty phase under Count Three, the motion is DENIED.

DONE this 30th day of May, 1991.

_____

UNITED STATES DISTRICT JUDGE

## TEXT OF 21 U.S.C. § 848

### § 848. Continuing criminal enterprise

**(a) Penalties; forfeitures**

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this chapter.

**(b) Conditions for life imprisonment for engaging in continuing criminal enterprise**

Any person who engages in a continuing criminal enterprise shall be imprisoned for life and fined in accordance with subsection (a) of this section if-

(1) such person is the principal administrator, organizer, or leader of the enterprise or is one of several such principal administrators, organizers, or leaders; and

(2)(A) the violation referred to in subsection (d)(1) of this section involved at least 300 times the quantity of a substance described in subsection 841(b)(1)(B) of this title, or

(B) the enterprise, or any other enterprise in which the defendant was the principal or one of several principal administrators, organizers, or leaders, received $10 million dollars in gross receipts during any twelve-month period of

its existence for the manufacture, importation, or distribution of a substance described in section 841(b)(1)(B) of this title.

**(c) Continuing criminal enterprise defined**

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if-

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter-

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

**(d) Suspension of sentence and probation prohibited**

In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and the Act of July 15, 1932 (D.C.Code, secs. 24-203 to 24-207), shall not apply.

**(e) Death penalty**

(1) In addition to the other penalties set forth in this section-

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) or section 960(b)(1) who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death; and

(B) any person, during the commission of, in furtherance of, or while attempting to avoid apprehension, prosection or service of a prison sentence for, a felony violation of this subchapter or subchapter II of this chapter who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of any Federal, State, or local law enforcement officer engaged in, or on account of, the performance of such officer's official duties and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

(2) As used in paragraph (1)(b), the term "law enforcement officer" means a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, prosecution or adjudication of an offense and includes those engaged in corrections, probation, or parole functions.

**(g)[1] Hearing required with respect to the death penalty**

A person shall be subjected to the penalty of death for any offense under this section only if a hearing is held in accordance with this section.

**(h) Notice by the Government in death penalty cases**

(1) Whenever the Government intends to seek the death penalty for an offense under this section for which one of the sentences provided is death, the attorney for the Government, a reasonable time before trial or acceptance by the court of a plea of guilty, shall sign and file with the court, and serve upon the defendant, a notice-

(A) that the Government in the event of conviction will seek the sentence of death; and

(B) setting forth the aggravating factors enumerated in subsection (n) of this section and any other aggravating factors which the Government will seek to prove as the basis for the death penalty.

(2) The court may permit the attorney for the Government to amend this notice for good cause shown.

**(i) Hearing before court or jury**

(1) When the attorney for the Government has filed a notice as required under subsection (h) of this section and the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the judge who presided at the trial or before whom the guilty plea was entered, or any other judge if the judge who presided at the trial or before whom the guilty plea was entered is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted-

(A) before the jury which determined the defendant's guilt;

(B) before a jury impaneled for the purpose of the hearing if-

(i) the defendant was convicted upon a plea of guilty;

(ii) the defendant was convicted after a trial before the court sitting without a jury;

(iii) the jury which determined the defendant's guilt has been discharged for good cause; or

(iv) after initial imposition of a sentence under this section, redetermination of the sentence under this section is necessary; or

(C) before the court alone, upon the motion of the defendant and with the approval of the Government.

(2) A jury impaneled under paragraph (1)(B) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate with the approval of the court that it shall consist of any number less than 12.

**(j) Proof of aggravating and mitigating factors**

Notwithstanding rule 32(c) of the Federal Rules of Criminal Procedure, when a defendant is found guilty of or pleads guilty

to an offense under subsection (e) of this section, no presentence report shall be prepared. In the sentencing hearing, information may be presented as to matters relating to any of the aggravating or mitigating factors set forth in subsections (m) and (n) of this section, or any other mitigating factor or any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Where information is presented relating to any of the aggravating factors set forth in subsection (n) of this section, information may be presented relating to any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. Any other information relevant to such mitigating or aggravating factors may be presented by either the Government or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials, except that information may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The Government and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the aggravating or mitigating factors and as to appropriateness in that case of imposing a sentence of death. The Government shall open the argument. The Defendant shall be permitted to reply. The Government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the Government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the evidence.

**(k) Return of findings**

The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist. If one of the

aggravating factors set forth in subsection (n)(1) of this section and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) of this section is found to exist, a special finding identifying any other aggravating factor for which notice has been provided under subsection (h)(1)(B) of this section, may be returned. A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) of this section is not found to exist or an aggravating factor set forth in subsection (n)(1) of this section is found to exist but no other aggravating factor set forth in subsection (n) of this section is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) of this section and one or more of the other aggravating factors set forth in section (n) of this section are found to exist, the jury, or it there is no jury, the court, shall then consider whether the aggravating factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence. The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed.

**(l) Imposition of sentence**

Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law. A sentence of death shall not be carried out upon a person who is under 18 years of age at the time the crime

was committed. A sentence of death shall not be carried out upon a person who is mentally retarded. A sentence of death shall not be carried out upon a person who, as a result of mental disability-

(1) cannot understand the nature of the pending proceedings, what such person was tried for, the reason for the punishment, or the nature of the punishment; or

(2) lacks the capacity to recognize or understand facts which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

**(m) Mitigating factors**

In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider mitigating factors, including the following:

(1) The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) The defendant is punishable as a principal (as defined in section 2 of Title 18) in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) The defendant could not reasonably have foreseen that the defendant's conduct in the course of the commission of murder, or other offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person.

(5) The defendant was youthful, although not under the age of 18.

(6) The defendant did not have a significant prior criminal record.

(7) The defendant committed the offense under severe mental or emotional disturbance.

(8) Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(9) The victim consented to the criminal conduct that resulted in the victim's death.

(10) That other factors in the defendant's background or character mitigate against imposition of the death sentence.

**(n) Aggravating factors for homicide**

If the defendant is found guilty of or pleads guilty to an offense under subsection (e) of this section, the following aggravating factors are the only aggravating factors that shall be considered, unless notice of additional aggravating factors is provided under subsection (h)(1)(B) of this section:

(1) The defendant-

(A) intentionally killed the victim;

(B) intentionally inflicted serious bodily injury which resulted in the death of the victim;

(C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;

(D) intentionally engaged in conduct which-

(i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and

(ii) resulted in the death of the victim.

(2) The defendant has been convicted of another Federal offense, or a State offense resulting in the death of a person, for

which a sentence of life imprisonment or a sentence of death was authorized by statute.

(3) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury upon another person.

(4) The defendant has previously been convicted of two or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(5) In the commission of the offense or in escaping apprehension for a violation of subsection (e) of this section, the defendant knowingly created a grave risk of death to one or more persons in addition to the victims of the offense.

(6) The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(7) The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(8) The defendant committed the offense after substantial planning and premeditation.

(9) The victim was particularly vulnerable due to old age, youth, or infirmity.

(10) The defendant had previously been convicted of violating this subchapter or subchapter II of this chapter for which a sentence of five or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(11) The violation of this title in relation to which the conduct described in subsection (e) of this section occurred was a violation of section 845 of this title.

(12) The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

**(o) Right of the defendant to justice without discrimination**

(1) In any hearing held before jury under this section, the court shall instruct the jury that in its consideration of whether the sentence of death is justified it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or the victim, and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be. The jury shall return to the court a certificate signed by each juror that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victim was not involved in reaching his or her individual decision, and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant, or the victim, may be.

(2) Not later than one year from November 18, 1988, the Comptroller General shall conduct a study of the various procedures used by the several States for determining whether or not to impose the death penalty in particular cases, and shall report to the Congress on whether or not any or all of the various procedures create a significant risk that the race of a defendant, or the race of a victim against whom a crime was committed, influence the likelihood that defendants in those States will be sentenced to death. In conducting the study required by this paragraph, the General Accounting Office shall-

(A) use ordinary methods of statistical analysis, including methods comparable to those rule admissible by the courts in race discrimination cases under title VII of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e et seq.];

(B) study only crimes occurring after January 1, 1976; and

(C) determine what, if any, other factors, including any relation between any aggravating or mitigating factors and the race of the victim or the defendant, may account for any

evidence that the race of the defendant, or the race of the victim, influences the likelihood that defendants will be sentenced to death. In addition, the General Accounting Office shall examine separately and include in the report, death penalty cases involving crimes similar to those covered under this section.

**(p) Sentencing in capital cases in which death penalty is not sought or imposed**

If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

**(q) Appeal in capital cases; counsel for financially unable defendants**

(1) In any case in which the sentence of death is imposed under this section, the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Notice of appeal must be filed within the time prescribed for appeal of judgment in section 2107 of Title 28. An appeal under this section may be consolidated with an appeal of the judgment of conviction. Such review shall have priority over all other cases.

(2) On review of the sentence, the court of appeals shall consider the record, the evidence submitted during the trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

(3) The court shall affirm the sentence if it determines that-

(A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

In all other cases the court shall remand the case for reconsideration under this section. The court of appeals shall state in writing the reasons for its disposition of the review of the sentence.

**(4)(A)** Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with a crime which may be punishable by death, a defendant who is or become financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services at any time either-

**(i)** before judgment; or

**(ii)** after the entry of a judgment imposing a sentence of death but before the execution of that judgment;

shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

**(B)** In any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).

**(5)** If the appointment is made before judgment, at least one attorney so appointed must have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years experience in the actual trial of felony prosecutions in that court.

**(6)** If the appointment is made after judgment, at least one attorney so appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in that court in felony cases.

**(7)** With respect to paragraphs (5) and (6), the court, for good cause, may appoint another attorney whose background,

knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation.

**(8)** Unless replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant, each attorney so appointed shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications,[2] for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

**(9)** Upon a finding in ex parte proceedings that investigative, expert or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or sentence, the court shall authorize the defendant's attorneys to obtain such services on behalf of the defendant and shall order the payment of fees and expenses therefore, under paragraph (10). Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision of and payment for such services nunc pro tunc.

**(10)** Notwithstanding the rates and maximum limits generally applicable to criminal cases and any other provision of law to the contrary, the court shall fix the compensation to be paid to attorneys appointed under this subsection and the fees and expenses to be paid for investigative, expert, and other reasonably necessary services authorized under paragraph (9), at such rates or amounts as the court determines to be reasonably necessary to carry out the requirements of paragraphs (4) through (9).

**(r) Refusal to participate by State and Federal correctional employees**

No employee of any State department of corrections or the Federal Bureau of Prisons and no employee providing services to that department or bureau under contract shall be required, as a condition of that employment, or contractual obligation to be in attendance at or to participate in any execution carried out under this section if such participation is contrary to the moral or religious convictions of the employee. For purposes of this subsection, the term "participation in executions" includes personal preparation of the condemned individual and the apparatus used for execution and supervision of the activities of other personnel in carrying out such activities.

(Pub. L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265; Pub. L. 98-473, Title II, §§ 224(b), 305, Oct. 12, 1984, 98 Stat. 2030, 2050; Pub. L. 98-473, § 224(b), formerly § 224(c), as amended Pub. L. 99-570, Title I, § 1005(b)(2), Oct. 27, 1987, 100 Stat. 3207-6; Pub. L. 99-570, Title I, §§ 1252, 1253, Oct. 27, 1986, 100 Stat. 3207-14, 3207-15; Pub. L. 100-690, Titles VI, VII, §§ 6481, 7001, Nov. 18, 1988, 102 Stat. 4382, 4387, 4388.)

[1] So in original.

[2] So in original. The comma probably should not appear here.

# FEDERAL DEATH PENALTY PROSECUTIONS, 1988-93

**David Bruck**
**Federal Death Penalty Resource Counsel Project**
**(803) 765-1044**

**December 8, 1993**

Following enactment of the first modern federal death penalty statute on November 18, 1988, 21 U.S.C. § 848(e)-(q) (the so-called "drug kingpin" murder provision), the Bush and Clinton Administrations have approved death penalty prosecutions under § 848 against 30 defendants. Of these, four defendants were white, four were Hispanic, and twenty-two were black. All nine of the prosecutions approved or announced as capital cases since Attorney General Reno took office involve African-American defendants.

*Federal capital cases tried to date*

Thus far, the Government has brought to trial a total of eight capital prosecutions, involving fourteen defendants, throughout the nation. Another seven cases (and a total of eleven defendants) are currently awaiting trial, and the death penalty has been dropped prior to trial against five defendants.

The federal death penalty cases brought to trial during 1989-1993 by the Bush and Clinton Administrations are listed below:

- A white Alabama marijuana grower named Ronald Chandler, was sentenced to death for the murder for hire of a subordinate in his drug ring. Chandler's convictions and death sentence were affirmed by a panel of the Eleventh Circuit July 19, 1993: a petition for rehearing to the full court of appeals is pending. Claiming innocence, Chandler refused a pretrial plea bargain offer for life without possibility of parole. *United States v. David Ronald Chandler,* Nos. 91-7466 & 7577 (11th Cir. July 19, 1993).

- Three of four young black inner-city gang members in Richmond, Virginia, were sentenced to death on February 16, 1993, for their roles in eleven crack-related murders. *United States v. Tipton et al.*, 3-92-CR68 (E.D. Va.). The trial of a fourth defendant, Vernon Thomas, was severed. On April 23, 1993, moments before a scheduled hearing on Mr. Thomas's motion to bar the death penalty due to his mental retardation, the government withdrew its request for the death penalty. Mr. Thomas was ultimately convicted and sentenced to life imprisonment.

- A Hispanic drug distributor was sentenced to death by a jury on August 2, 1993 in Brownsville, Texas, in connection with the murders of three other drug traffickers in the Brownsville area. *United States v. Juan Raul Garza*, No. CR 93-0009 (S.D. Tex.). Attorney General Barr authorized the prosecution to seek the death penalty in December, 1992.

- Two Hispanic defendants in Texas were sentenced to life imprisonment and forty years, respectively, for the marijuana-related murder of a state police officer after a joint trial. The sentencing jury found no facts legally warranting the death penalty. *United States v. Reynaldo & Baldemar Villarreal* No. 9:91CR4 (E.D. Tex. 1991), *aff'd*, 963 F. 2d 725 (5th Cir.), *cert. denied*, 113 S. Ct. 353 (1992).

- Two black Chicago gang members received life sentences for cocaine-related murders after separate trials. The Government had offered one defendant, but not the other, a plea bargain prior to trial. *United States v. Alexander Cooper & Anthony Davis*, No. 89-CR-0580 (N.D. Ill. 1991).

- A white Mafia contract killer received a life sentence from a Brooklyn, New York jury after being convicted of eight murders, three of which qualified as capital crimes under 21 U.S.C. § 848. *United States v. Pitera*, 795 F. Supp. 546 (E.D.N.Y. 1992).

- A young black New Jersey gang member committed suicide during his federal capital trial. *United States v. Bilal Pretlow*, No. 90-CR-238 (D.N.J.).

- Two white and one Hispanic defendants were tried jointly in connection with the drug-related kidnap/murder of a Muskogee, Oklahoma auto dealership employee. *United States v. Hutching et al.*, No. CR-032-S (E.D. Okl.). The two capitally-charged "managers" of the drug enterprise received life sentences from the jury, while the lowest-level defendant, John McCullah (who, unlike the bosses, had been present at the killing) was sentenced to death on March 23, 1993.

*The 1992 upsurge in federal death cases*

Between the beginning of 1992 and January 20, 1993, seven new prosecutions involving fourteen capital defendants were authorized by Attorney General Barr. **This amounts, in one (Presidential campaign) year, to a six-fold increase over the 1989-1991 rate of federal capital authorizations under § 848.**

*Federal capital prosecutions still awaiting trial*

In addition to the four-defendant Virginia case, the three-defendant Oklahoma case, and the single-defendant Texas case mentioned above, the capital prosecutions initiated since early 1992 involve indictments charging:

- two black New Orleans inner-city gang members, in connection with an allegedly drug-related murder. *United States v. Green & Brown*, E.D. La. No. 92-46. On November 24, 1992, the Government dropped its request for the death penalty in this case.

- one black Tampa, Florida drug distributor, for having allegedly ordered a murder in retaliation for the theft of drugs. *United States v. Mathis*, (M.D. Fla. No. 91-301-CR-T-17(A)). Trial is set in this case for February, 1994.

- one black Atlanta drug distributor in connection with three murders. *United States v. Williams*, No. 1:92-CR-142 (N.D. Ga.). No trial date is set as yet.

- two black crack cocaine dealers in Macon Georgia, in connection with the murders of two other crack dealers. *United States v. Tony Chatfield and Arleigh Carrington*, (M.D. Ga. No. 92-82MAC-WDO). Attorney General Barr authorized this death prosecution in his last week in office. On December 6, 1993, the government dropped its request for the death penalty against these two defendants.

The Federal Death Penalty Resource Counsel Project is aware of four cases, involving nine defendants, in which the death penalty is reported to have been authorized by Attorney General Reno, or announced since she took office. All nine defendants are African-American, and three of the four cases have been brought in jurisdictions (New York, Michigan, and the District of Columbia) which do not have capital punishment statutes. The cases are:

- *United States v. Darryl Johnson*, (W.D.N.Y. Cr. No. 92-159-C-S), involving two alleged cocaine-related killings by a Buffalo, New York group.
- *United States v. Wayne Anthony Perry* (D.C.D.C. No. 92-CR-474), an alleged hitman for a D.C. cocaine distribution ring; eight homicide counts.
- *United States v. Reginald Brown et al.*, (E.D. Mich. Cr. No. 92-81127). This case reportedly involves *six* death authorizations against members of a cocaine distribution organization alleged to be responsible for a total of twelve murders over a 4-year period. The initial authorization occurred during the Bush Administration, but the authorizations were not announced until June, 1993. Only three of the six defendants against whom the death penalty has been authorized are currently in custody. One defendant, *Terrence Brown*, has been found dead, apparently a homicide victim.
- *United States v. Michael Murray*, (M.D. Pa. Cr. No. 1:CR-92-200), involves the killing of a Harrisburg drug dealer by a gang headed by one Jonathan Bradley.

DOJ reportedly declined to approve the U.S. Attorney's request to authorize the death penalty against Bradley, who allegedly ordered the killing, and against another participant in the shooting, Emmanuel S. Harrison.

**"Return of Findings**

"(k) The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factors set forth in subsection (n), found to exist. If one of the aggravating factors set forth in subsection (n)(1) and another of the aggravating factors set forth in paragraphs (2) through (12) of subsection (n) is found to exist, a special finding identifying any other aggravating factor may be rurned [sic]. A fiing [sic] with respect to a mitigating factor may be made by one or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established. A finding with respect to any aggravating factor must be unanimous. If an aggravating factor set forth in subsection (n)(1) is not found to exist or an aggravating factor set forth in subsection (n)(1) is found to exist but no other aggravating factor set forth in subsection (n) is found to exist, the court shall impose a sentence, other than death, authorized by law. If an aggravating factor set forth in subsection (n)(1) and one or more of the other aggravating factors set forth in subsection (n) are found to exist, the jury, or if there is no jury, the court, shall then consider whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist, or in the absence of mitigating factors, whether the aggravating factors are themselves sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall return a finding as to whether a sentence of death is justified."

No. 93-1033

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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DAVID RONALD CHANDLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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DREW S. DAYS, III
*Solicitor General*

JO ANN HARRIS
*Assistant Attorney General*

ROBERT J. ERICKSON
*Attorney*

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## QUESTIONS PRESENTED

1. Whether the district court erred in failing to instruct the jury regarding the non-capital sentencing alternatives to which petitioner would be subject if the jury did not recommend imposition of a sentence of death.

2. Whether the district court was required to inform the jury of the consequences of its failure to reach a unanimous recommendation to impose a sentence of death, even though it advised the jury specifically that a sentence of death could be imposed only upon the unanimous recommendation of the jury.

3. Whether the district court committed plain error when it failed to require the jury to return specific written findings regarding the existence or non-existence of mitigating factors.

4. Whether 21 U.S.C. 848 adequately narrows the class of death-eligible defendants.

5. Whether the indictment and the jury instructions adequately described the required nexus between the murder and petitioner's operation of a continuing criminal enterprise.

6. Whether the district court displayed excessive bias in its comments explaining an adverse ruling on a pretrial motion.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 4 |
| Conclusion | 26 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Clemons* v. *Mississippi*, 494 U.S. 738 (1990) | 22 |
| *Godfrey* v. *Georgia*, 446 U.S. 420 (1980) | 22 |
| *Hamling* v. *United States*, 418 U.S. 87 (1974) | 23 |
| *Henry* v. *Mississippi*, 379 U.S. 443 (1965) | 9 |
| *Kubat* v. *Thieret*, 867 F.2d 351 (7th Cir. 1989), cert. denied, 493 U.S. 874 (1989) | 15 |
| *Liteky* v. *United States*, 114 S. Ct. 1147 (1994) | 25 |
| *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988) | 14, 21 |
| *Maynard* v. *Cartwright*, 486 U.S. 356 (1988) | 22 |
| *Mills* v. *Maryland*, 486 U.S. 367 (1988) | 18 |
| *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) | 11 |
| *Simmons* v. *South Carolina*, cert. granted, 114 S. Ct. 57 (1993) | 4 |
| *Stringer* v. *Black*, 112 S. Ct. 1130 (1992) | 22 |
| *Tison* v. *Arizona*, 481 U.S. 137 (1987) | 22 |
| *United States* v. *Atkinson*, 297 U.S. 157 (1936) | 8 |
| *United States* v. *Muskovsky*, 863 F.2d 1319 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989) | 9 |
| *United States* v. *Olano*, 113 S. Ct. 1770 (1993) | 8, 16 |
| *United States* v. *Villarreal*, 963 F.2d 725 (5th Cir.), cert. denied, 113 S. Ct. 353 (1992) | 8 |

Constitution, statutes, rules and regulations: Page

U.S. Const.:
Amend. V ..... 7
Due Process Clause ..... 9
Amend. VIII ..... 7, 9, 18, 22
Amend. XIV ..... 18
18 U.S.C. 924(c) ..... 3
18 U.S.C. 1956 ..... 3
18 U.S.C. 3553(b) .....
18 U.S.C. 3742(f) ..... 20
21 U.S.C. 841 ..... 3
21 U.S.C. 846 ..... 3
21 U.S.C. 848 ..... 11, 18, 20, 21
21 U.S.C. 848(a) ..... 3
21 U.S.C. 848(e) ..... 2, 3, 8, 9, 10, 12, 15, 17, 21
21 U.S.C. 848(e)(1)(A) ..... 8, 23
21 U.S.C. 848(k) ..... 5, 8, 11, 12, 16, 17, 18, 19
21 U.S.C. 848(*l*) ..... 7, 12, 14
21 U.S.C. 848(m)(6) ..... 16
21 U.S.C. 848(m)(8) ..... 16
21 U.S.C. 848(n)(1)(C) ..... 20, 21
21 U.S.C. 848(n)(6) ..... 21
21 U.S.C. 848(p) ..... 7
21 U.S.C. 848(q) ..... 19, 20
21 U.S.C. 848(q)(3) ..... 19
21 U.S.C. 848(q)(3)(B) ..... 19
Fed. R. Civ. P. 49 ..... 17
Fed. R. Crim. P.:
Rule 12(b)(1) ..... 23
Rule 30 ..... 8
Rule 31(e) ..... 17
Rule 52(b) ..... 15, 20, 24
Sentencing Guidelines:
§ 2A1.1 ..... 8
§ 5K2.0 ..... 8

Miscellaneous:

134 Cong. Rec. (1988):
p. 11,044 ..... 18

Miscellaneous—Continued:


| | Page |
|---|---|
| p. 11,045 | 19 |
| pp. 12,862-12,863 | 18 |
| p. 13,748 | 18 |
| pp. 14,103-14,104 | 18 |
| S. 2355, 100th Cong., 2d Sess. (1988) | 18, 19 |
| S. 2455, 100th Cong., 2d Sess. (1988) | 18 |

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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No. 93-1033

DAVID RONALD CHANDLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A55) is reported at 996 F.2d 1073.

### JURISDICTION

The judgment of the court of appeals was entered on July 19, 1993. A petition for rehearing was denied on September 30, 1993. Pet. App. A57-A58. The petition for a writ of certiorari was filed on December 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of a variety of narcotics and money-laundering offenses not directly relevant to the petition, as well as committing murder in furtherance of a criminal enter-

prise, in violation of 21 U.S.C. 848(e). The district court sentenced petitioner to death on the murder charge. The court of appeals affirmed the sentence of death. Pet. App. A1-A55.

1. Between 1988 and 1990, petitioner developed an extensive marijuana growing and distribution operation centered in northeastern Alabama, which involved the cultivation of more than 100 separate plots of land. Petitioner also employed couriers to transport to Alabama processed marijuana that he purchased from suppliers in Texas and Georgia for eventual distribution through his network of distributors. See Pet. App. A3.

One of petitioner's dealers was Donna Shuler, the half-sister of petitioner's wife and Charles Ray Jarrell, Sr., who worked for petitioner as a courier. On March 2, 1990, state law enforcement officers conducted a warrant-authorized search of Donna Shuler's home, which resulted in her arrest and the seizure of about one kilogram of marijuana. When Donna Shuler's attorney reviewed the government's case file, he made a copy of an affidavit attached to the search warrant, which indicated that the information leading to the search of her apartment had come from Marlin Shuler, Donna Shuler's former husband. See Pet. App. A3-A4.

On the morning of May 8, 1990, petitioner went to the residence of Charles Ray Jarrell, Sr. Marlin Shuler was at Jarrell's house when petitioner arrived. Speaking privately to Jarrell, petitioner stated that Marlin Shuler was "going to cause me and you a whole lot of trouble" and suggested that Jarrell "go on and take care of him." Pet. App. A5. Petitioner added that he "still [had] that $500.00" for Jarrell, referring to an earlier conversation between petitioner and Jarrell (before the search of Donna Shuler's apartment), during which petitioner had offered Jarrell $500 if he would kill Marlin Shuler. See *id.* at A3-A5.

After petitioner departed, Jarrell and Marlin Shuler spent the morning drinking heavily. The two men then drove to Snow's Lake, where they engaged in target

practice with two pistols that Jarrell had brought: a .380 caliber pistol that Jarrell owned and a nine millimeter pistol that petitioner had left in Jarrell's car the previous night. Jarrell then shot Shuler twice with the nine millimeter pistol and killed him. Jarrell drove to petitioner's house and told him that he had killed Shuler. Petitioner and Jarrell returned to Snow's Lake, retrieved Shuler's body, and buried it near an abandoned liquor still. See Pet. App. A5.

2. A grand jury in the United States District Court for the Northern District of Alabama returned an indictment charging petitioner with conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; distribution of marijuana, in violation of 21 U.S.C. 841; engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848(a); murder in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. 848(e); using or carrying a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c); and money laundering, in violation of 18 U.S.C. 1956. Jarrell entered into a plea agreement, pursuant to which he pleaded guilty to the conspiracy charge and testified for the government at petitioner's trial. The jury found petitioner guilty on all counts. See Pet. App. A2, A6.

The district court then conducted a penalty hearing, at which the government resubmitted all of the evidence adduced at the guilt phase that was relevant to Shuler's murder. The government and petitioner stipulated to several mitigating circumstances: that petitioner had no prior felony or drug convictions; that state murder charges against Jarrell and Jarrell's son had been dismissed; and that neither would be prosecuted by federal or state authorities in connection with Shuler's murder. After receiving its instructions, the jury unanimously found as aggravating circumstances that petitioner intentionally had caused Shuler's murder and that petitioner procured the murder by promising the payment of money. The jury unanimously recommended that the death sen-

tence be imposed. The district court accepted the jury's recommendation and imposed a sentence of death. See Pet. App. A6-A7.

3. The court of appeals affirmed petitioner's capital murder conviction and death sentence. Pet. App. A1-A55.[1]

## ARGUMENT

Petitioner presents six different questions challenging the court of appeals' affirmance of petitioner's convictions and sentence of death. Because the Court's decision in *Simmons* v. *South Carolina*, No. 92-9059 (argued Jan. 18, 1994), might affect the proper analysis of the first question, the petition should be held for this Court's decision in *Simmons*. None of the other contentions raised by the petition warrants review by this Court.

1. Petitioner first contends (Pet. 7-12) that the district court erred in failing to advise the jury of the sentence that petitioner would face if the jury did not recommend a sentence of death.

a. In the district court, petitioner initially asked that the jury be instructed:

> If you do not recommend the death penalty, the Court will impose a sentence of life imprisonment without possibility of release or some other sentence authorized by law. It is your responsibility to decide whether [petitioner] is to be put to death. If you decide that he is not, any other sentencing responsibility belongs to the Court.

2 R. Item 220 (Requested Instruction No. A-12).[2] Similarly, at the charging conference, the parties discussed a draft set of instructions that provided as follows:

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[1] The court affirmed in all other respects as well, except that it accepted the government's concession that the conspiracy conviction should be vacated because it was a lesser included offense of the continuing criminal enterprise conviction. Pet. App. A51.

[2] We cite the record on appeal as "R.," with an arabic number preceding the citation to indicate the volume of the record in which the cited document appears.

> Your only interest is to seek the truth from the evidence and to determine in the light of that evidence and the court's instruction of law whether to recommend a sentence of death rather than a sentence of life imprisonment without possibility of release or some other lesser sentence to be determined by the court.

2 R. Item 221, Court Exh. 6, at 10.

Petitioner's counsel objected to that proposed instruction, explaining: "I don't think they [*i.e.*, the jurors] make a recommendation of a sentence if they don't recommend death." The court agreed, explaining: "They don't. I just picked up—I actually there had turned to the statute and that is what the statute says, that they are to recommend."[3] When petitioner's counsel responded "That's right," the court stated: "I'm quite willing to drop that. I see how that could be confusing to them." Petitioner's counsel again responded, "That's right," the court stated "That suits me," and petitioner's counsel closed the discussion by saying: "All right." Apr. 2, 1991, Tr. [14 R.] 40-41; see also *id.* at 57-58 (colloquy between court and petitioner's counsel reiterating that the language was deleted at the request of petitioner's counsel).

As a result of that discussion, the district court instructed the jury as follows:

> Your only interest is to seek the truth from the evidence and to determine in the light of that evidence and the court's instruction of law whether to recommend a sentence of death. If you do not make such a recommendation, the court is required by law to impose a sentence other than death, which sentence is to be determined by the court alone.

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[3] The court apparently was referring to the penultimate sentence of 21 U.S.C. 848(k), which provides that the jury "shall recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence."

Apr. 3, 1991, Tr. [15 R.] 87; see *id.* at 85 ("[Y]ou are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence. That is a matter for me to decide in the event you conclude that a sentence of death should not be recommended.").[4]

At the conclusion of the instructions, petitioner's counsel expressly objected to the district court's instructions that the jury was required to agree unanimously on the absence of an aggravating circumstance and on a recommendation against the death sentence (an objection discussed at pages 12-15, *infra*). After the district court noted and overruled that objection, petitioner's counsel asked for an opportunity to review the instructions he had requested to "see if there are any others" to which he wished to object. The district court stated: "As far as I'm concerned you have an exception to my failure to give each of your fifteen [proposed instructions] in the language that you suggested to me to give them." Apr. 3, 1991, Tr. [15 R.] 93-94.

b. On appeal, petitioner contended that the jury had the power to recommend the sentence to be imposed if the jury did not recommend a sentence of death or, in the alternative, that the district court at a minimum should have advised the jury of the sentence that petitioner would have faced if the jury had not recommended a sentence of death. The court of appeals first rejected the contention that the jury should have been authorized to determine the alternative non-capital sentence. Pet. App. A9-A12. The court noted that petitioner had invited the instruction advising the jury that the judge would determine the alternative sentence (*id.* at A10), and also concluded that the district court's instructions were correct in any event.

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[4] The portion of the instructions set forth in the last quotation in the text had appeared in the draft of the instructions discussed at the charging conference (2 R. Item 221, Court Exh. 6, at 8), and petitioner did not object to it at that time.

The court noted that Section 848(*l*) provides, in cases where the jury does not recommend death, that "the court shall impose a sentence, other than death, authorized by law." Similarly, Section 848(p) provides that "the court may impose a sentence of life imprisonment without the possibility of parole." Pet. App. A11.[5]

The court then rejected petitioner's alternative claim that the district court should have advised the jury of the sentence that petitioner would face if the jury did not recommend a sentence of death. Pet. App. A12-A14. The court reiterated that the responsibility for determining the sentence if the jury did not recommend death rested with the judge, and stated that "[n]othing in Section 848 requires the jury to be informed of what sentence the defendant might receive in the absence of death." *Id.* at A14. Accordingly, the court of appeals concluded that the jury instructions were correct.

c. Although the relevant portion of the petition (Pet. 7-12) is ambiguous, it seems clear that petitioner no longer argues, as he did in the court of appeals, that the jury was entitled to recommend a specific non-capital sentence if it determined not to recommend a sentence of death. That portion of the petition may be read to raise three related claims, however, which we discuss separately.

i. The focus of the first question presented seems to be an objection to the district court's failure to instruct the sentencing jury that petitioner's "alternative sentence would be life without parole." Pet. 7. But petitioner never requested that instruction in the district court[6] and never

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[5] The court also rejected petitioner's related contention that its interpretation of the statute violated the Fifth and Eighth Amendments. Pet. App. A11-A12.

[6] Petitioner's requested instructions with respect to the penalty hearing appear at 2 R. Item 220. The relevant instruction (No. A-12), which we quote above, described a range of possible alternative sentences—"life imprisonment without possibility of release or some other sentence authorized by law"—and thus would not have indicated that

argued for that instruction in the court of appeals.[7] That claim, therefore, is not properly before the Court. See Fed. R. Crim. P. 30; *United States* v. *Atkinson*, 297 U.S. 157, 159 (1936). In any event, that instruction would have been an inaccurate statement of law, because an unqualified "life without parole" instruction would not have apprised the jury of the sentencing alternatives that actually were available to the judge in the event the jury did not recommend a capital sentence.[8]

ii. To the extent that petitioner suggests (Pet. 7, 9) that he was entitled to a jury charge using language that tracks the language of Section 848(k) indicating that jurors are charged with determining that a sentence of death is appropriate "rather than" some lesser sentence (see note 3, *supra*), petitioner has waived that claim, because, as explained above, he expressly requested the deletion of the language in question. See *United States* v. *Olano*, 113 S. Ct. 1770, 1777 (1993).[9] Federal courts tradi-

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petitioner would be subject to a specific sentence of life imprisonment without possibility of release.

[7] In the court of appeals, petitioner claimed that the jury should have been advised "of the *maximum* alternative sentence to death—a term of life imprisonment without parole," Pet. C.A. Br. 32 (emphasis added), or that the judge "should have either determined [petitioner's] sentence on the other counts prior to deliberations or informed the jury of the applicable sentencing range," *id.* at 32 n.9.

[8] Although petitioner correctly notes (Pet. 7 n.6) that Sentencing Guidelines § 2A1.1 provides for a base offense level that requires life without parole, 18 U.S.C. 3553(b) and Sentencing Guidelines § 5K2.0 authorize the court to depart downward from the Guidelines' range. In the case of petitioner's offense, the statute permits a minimum sentence of 20 years' imprisonment. 18 U.S.C. 848(e)(1)(A). Departures have occurred under that provision. See *United States* v. *Villarreal*, 963 F.2d 725, 727 (5th Cir.) (in trial under Section 848(e), jury recommended against death, and trial court departed downward to sentence one defendant to 40 years' imprisonment), cert. denied, 113 S. Ct. 353 (1992).

[9] Petitioner's general reservation of error at the end of the instructions (Apr. 3, 1991, Tr. [15 R.] 93-94) did not preserve that claim, because petitioner's proposed instructions (2 R. Item 220) did not include such an instruction.

tionally have been reluctant to permit attorneys to request or agree to a particular procedure and then challenge the procedure as error on appeal. To recognize such claims would provide an incentive to a defendant to inject error into the trial in the hope of creating grounds for reversal in the event of conviction. See *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965). As a result, defendants like petitioner who request the deletion of language from an instruction, even more than defendants who merely fail to object to an instruction, have no right to claim on appeal that the district court erred in omitting the challenged language. See *United States* v. *Muskovsky*, 863 F.2d 1319, 1329 (7th Cir. 1988), cert. denied, 489 U.S. 1067 (1989).

iii. Finally, petitioner appears to renew (Pet. 8 n.7) his argument that the court should have given his requested instruction that the judge would "impose a sentence of life imprisonment without possibility of release or some other sentence authorized by law." Because the merits of that argument may be affected by this Court's decision in *Simmons*, the case should be held pending that decision.

In *Simmons*, a defendant who received a capital sentence argues (Pet. Br. 13-38) that the Due Process Clause and the Eighth Amendment required the trial court to give the jury an accurate instruction that the only available sentence if he were not sentenced to death was life imprisonment without the possibility of parole. Even if this Court were to accept that claim, the Court's analysis would not necessarily require the conclusion that the Constitution compels that any particular instruction regarding non-capital sentencing alternatives be given in a proceeding under Section 848(e). The federal sentencing scheme, unlike the state sentencing scheme at issue in *Simmons*, does not require a specific sentence of life imprisonment without the possibility of parole as the only alternative to a death sentence. Rather, it permits the court to impose a sentence of imprisonment ranging from 20 years to life. See note 8, *supra*. Accordingly, an

instruction that accurately informed the jury of the judge's full range of sentencing options under Section 848(e) in fact could prejudice the defendant by suggesting to the jury that a sentence of death would be the only certain means to incapacitate the defendant permanently. Here, for example, petitioner was eligible for a sentence as low as 20 years' imprisonment if the jury did not recommend death.[10]

Moreover, the fact that Simmons would have been sentenced to life imprisonment without the possibility of parole was crucial to the defendant's theory of mitigation in that case, which was that any propensity Simmons had for violence could be controlled by incarceration (which would be permanent). Here, by contrast, petitioner's principal argument against the death penalty was a quite different one, that the circumstances of the crime and of his character indicated that death would be an excessive penalty. Apr. 3, 1991, Tr. [15 R.] 58-63. Hence, the likelihood of incarceration for life without the possibility of release was not nearly so relevant in this case as it was in *Simmons*.

In sum, because the federal sentencing system differs from the system at issue in *Simmons*, and because petitioner's defense at the sentencing hearing did not raise the issues presented by the sentencing hearing under review in *Simmons*, the Court's decision in that case, even if it upheld the defendant's claims, would not necessarily support petitioner's constitutional arguments here.

Nevertheless, the Court's resolution of the question presented in *Simmons* may lend support to petitioner's claim that the Constitution required instructions to his jury regarding the possible alternative sentences. And the

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[10] An instruction that informed the jury of that prospect could undercut the main purpose that petitioner contends would be achieved by giving an alternative-sentence instruction: overcoming the jurors' "fear [of] the early release of capital offenders," which, petitioner argues, "is a powerful factor weighing in favor of recommendations of death." Pet. 9.

constitutional principles explained in *Simmons* also may have a bearing on petitioner's statutory claims. Although no provision in Section 848 specifically directs the judge to advise the sentencing jury of the range of alternative sentences that would be available if the jury recommends against death,[11] the language of the statute does indicate that the jury must recommend "that a sentence of death be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence," 21 U.S.C. 848(k).[12] Accordingly, if the decision in *Simmons* creates significant doubts about whether Section 848 would be constitutional if it did not require an instruction advising the jurors of the alternative sentences available, it could be appropriate to construe Section 848(k) in a fashion that avoids those constitutional concerns.[13] Cf., *e.g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979).

In our view, the appropriate course for the Court in the event *Simmons* lends support to petitioner's claim would be to vacate the judgment of the court of appeals and remand the case to that court. Because the court of

[11] Other provisions of Section 848 include explicit requirements for jury instructions on particular issues. See Section 848(k) ("The jury or the court, regardless of its findings with respect to aggravating and mitigating factors, is never required to impose a death sentence and the jury shall be so instructed."). The absence of such a requirement here undermines petitioner's statutory claim considerably.

[12] As explained above, petitioner had the trial judge delete from the instructions language that closely resembles that phrase of the statute. Apr. 2, 1991, Tr. [14 R.] 40-41 (colloquy regarding instructions); see 2 R. Item 221, Court Exh. 6, at 10 (text of court's proposed instruction).

[13] The legislative history recounted by petitioner, see Pet. 9-11, suggests that the Congress intended for the jury to make an affirmative choice to recommend death (rather than some other sentence). Although that history standing alone would not require the giving of an instruction that the plain language of the statute does not require, it could support a construction of the statute that would relieve Section 848(k) of constitutional difficulties.

appeals rejected petitioner's claim on the merits, it did not address the government's argument (Gov't C.A. Br. 25-27 & n.16), which we have summarized above, that petitioner failed to preserve his claim that the jury should have been advised of the non-capital sentencing options. Furthermore, given the significant differences between the federal statute and the state statute at issue in *Simmons*, it would be appropriate to allow the court of appeals to consider the applicability of *Simmons* to Section 848(e) in the first instance. Accordingly, it is appropriate for the Court to hold the petition in this case pending the decision in *Simmons*.

2. Petitioner next contends (Pet. 13-15) that the sentence of death should be overturned because the instructions did not adequately explain to the jury that petitioner would receive a non-capital sentence if the jury failed to reach a unanimous verdict on the penalty issue.

a. Under Section 848(k), a jury's recommendation in favor of a death sentence must be "by unanimous vote." If the jury does not unanimously recommend that a sentence of death be imposed, the trial court is directed to "impose a sentence, other than death, authorized by law." Section 848(*l*). In submitting this case to the jury at the penalty phase, the district court instructed the jury that, with respect to each of the alleged aggravating factors, the jury should "unanimously find" that the government "has" or "has not" established the factor beyond a reasonable doubt. Apr. 3, 1991, Tr. [15 R.] 88-90.[14] Similarly, with respect to

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[14] The verdict forms made it clear that the jurors did not have to reach unanimous agreement on mitigating factors:

> We also understand that a finding with respect to a mitigating factor may be made by any one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of his or her weighing of the aggravating factors and mitigating factors regardless of the number of jurors who concur that the factor has been established.

its ultimate recommendation regarding punishment, the court instructed that the jury should "unanimously recommend" that "a sentence of death be imposed" or that "a sentence of death not be imposed." *Id.* at 90-91 (emphasis omitted). The court further explained "that a jury is never required to impose a death sentence and that a recommendation that a sentence of death be imposed cannot be made except by a unanimous vote." *Id.* at 91. Earlier, the court had explained that if the jury did "not make such a recommendation, the court is required by law to impose a sentence other than death." *Id.* at 87.

b. The court of appeals rejected petitioner's claim that those instructions constituted reversible error. Pet. App. A18-A21. The court of appeals held that the district court was "not required to instruct the jury on the consequence of the jury's inability to reach a unanimous verdict." *Id.* at A20. The court relied on "the general interest the criminal justice system has in unanimous verdicts," and explained that "[a]sking the jury to return a unanimous verdict forces jurors to examine their views on the case and engage in discussions and deliberations as they attempt to resolve their differences." *Ibid.*

c. At bottom, petitioner challenges the trial court's unwillingness to give the jury a specific instruction describing the consequences that would follow if the jury did not reach unanimous agreement on the propriety of a sentence of death. The trial court's refusal to give such an instruction does not justify overturning petitioner's sentence.

Our criminal justice system has a significant interest in encouraging juries to reach unanimous conclusions in all cases where that can be done consistently with the sincerely held views of the individual jurors. The interest in jury unanimity is particularly important when the question is whether a defendant should receive a sentence

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Apr. 3, 1991, Tr. [15 R.] 90-91. Petitioner's objection to that instruction is discussed at pages 15-20, *infra*.

of death, because the government has a "strong interest in having the jury express the conscience of the community on the ultimate question of life or death." *Lowenfield* v. *Phelps*, 484 U.S. 231, 238 (1988) (internal quotation marks omitted). Hence, the Court has rejected an attack, in the capital context, on an *Allen* charge urging jurors to attempt to reach a consensus. *Id.* at 238-239. The instructions and the verdict form used in this case furthered the interest in jury unanimity by encouraging the jury to reach unanimous agreement on the questions submitted to it.

Contrary to petitioner's argument (Pet. 13, 15), the instructions did not misinform the jury about the consequences that would follow upon the jury's inability to reach unanimous agreement. None of the instructions indicated that there was any possibility of petitioner receiving a death sentence if the jury did not reach unanimous agreement. Furthermore, several of the instructions affirmatively suggested that petitioner would not be sentenced to death if the jury failed to agree. See, *e.g.*, Apr. 3, 1991, Tr. [15 R.] 87 ("If you do not make such a recommendation [*i.e.*, a unanimous recommendation of a sentence of death], the court is required by law to impose a sentence other than death."). What the instructions did not do is specifically advise the jury of the effect of Section 848(*l*), which provides that if the jury does not agree unanimously, the court does not attempt to secure a unanimous verdict from a second jury, but instead proceeds directly to impose a non-capital sentence. Because the effect of the instruction petitioner seeks is to undermine the jury's sense of its obligation to reach unanimous agreement if it is able to do so, it is not error for the court to refuse to give the instruction.

Petitioner's claim that the courts are in conflict on the question (Pet. 14-15) is unfounded. First, there is no conflict in cases interpreting the statute at issue in this case for the simple reason that this is the only appellate decision interpreting that statute. Moreover, although

petitioner discusses (Pet. 14) the procedures that have been followed by district courts conducting sentencing hearings in some of the other capital cases that have been tried under Section 848(e), he does not cite any opinion of the courts in those cases holding that the statute or the Constitution required the court to give the instruction he requests here. Similarly, none of the habeas corpus cases on which petitioner relies (Pet. 15 n.16) involved instructions that accurately advised the jury that its decisions with respect to aggravating factors required unanimity and that those with respect to mitigating factors did not.[15] In sum, petitioner fails to establish that the court of appeals' resolution of a question of first impression creates a conflict warranting attention by this Court.

3. Petitioner next contends (Pet. 16-23) that the district court committed plain error in failing to require the jury to return written findings regarding the existence of mitigating factors.

a. The court of appeals addressed and rejected that claim. Pet. App. A14-A18. The court explained that "[a]t no time * * * did [petitioner] request that the jury be instructed to return written findings of mitigating factors or object to the lack of such an instruction," and thus concluded that petitioner's counsel in the district court "did not adequately bring [that claim] to the district court's attention." *Id.* at A14-A15. Accordingly, the court reviewed the claim for plain error under Fed. R. Crim. P. 52(b). Pet. App. A15.

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[15] In *Kubat* v. *Thieret*, 867 F.2d 351 (7th Cir.), cert. denied, 493 U.S. 874 (1989), the court overturned a death sentence where it concluded that the instructions did not clearly indicate that unanimity was required for a sentence of death and suggested that unanimity was required for findings of mitigating factors. 867 F.2d at 373. As summarized above, the instructions in this case stated that "a recommendation that a sentence of death be imposed cannot be made except by a unanimous vote," Apr. 3, 1991, Tr. [15 R.] 91, and also indicated that there was no unanimity requirement with respect to mitigating factors, see note 14, *supra*.

Applying the analysis set forth in *United States* v. *Olano*, 113 S. Ct. 1770, 1777-1778 (1993), the court started by determining whether an error was committed. The court noted that Section 848(k) expressly requires the jury to return findings regarding aggravating factors, but includes no such requirement for mitigating factors. Pet. App. A15-A16. The court nevertheless concluded that "Section 848 requires that the jury be instructed that it has the option to return written findings of mitigating factors if it so chooses, but that it does not require the return of such findings." *Id.* at A16. Because the district court did not give such an instruction in this case, the court of appeals concluded that the district court committed error. *Id.* at A16-A17.

The court nevertheless held that it was not appropriate to vacate petitioner's sentence of death, because it concluded that the error did not affect petitioner's substantial rights. Pet. App. A17-A18. The court explained that the parties "stipulated that [petitioner] had no prior conviction on any felony or drug charge and that Jarrell would not receive the death penalty,"[16] and the instructions actually given properly informed the jurors "how to find mitigating factors and the role of mitigating factors in their decision making process." *Id.* at A17. Relying on the presumption that jurors "follow the instructions they are given," the court concluded that the "error did not affect the outcome of the sentencing hearing." *Id.* at A17-A18.

b. We continue to believe that the trial court properly interpreted Section 848(k) not to require the jury to return written findings regarding mitigating factors. In any event, even if the trial court's failure to require such findings was incorrect, the court of appeals properly

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[16] Both of those circumstances were related to statutory mitigating factors. See Section 848(m)(6) (capital defendant "did not have a significant prior criminal record") and (8) ("[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death").

concluded that the error did not affect petitioner's substantial rights.

i. Subsection (k) of Section 848—headed "Return of findings"—is the provision of the statute that directly addresses the findings to be made by the jury in a capital prosecution under Section 848(e). The second sentence of that provision deals with findings regarding statutory aggravating factors: the jury "shall return special findings identifying any [statutory] aggravating factors * * * found to exist." The third sentence deals with non-statutory aggravating factors, and provides that if the requisite statutory aggravating factors are found, "a special finding identifying any other aggravating factor * * * may be returned." Section 848(k). The fourth sentence deals with findings of mitigating factors, as follows:

> A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established.

Those provisions offer two strong textual indicators that a jury at a hearing under Section 848(k) is not required to return findings regarding mitigating factors. First, the second and third sentences, which deal with aggravating factors, expressly refer to the jury's "return" of findings. The absence of similar language in the fourth sentence, which deals with mitigating factors, suggests that the jury need not "return" the findings discussed in that sentence. Similarly, the second and third sentences refer to "special" findings, language evocative of jury findings returned separately from a general verdict. See Fed. R. Crim. P. 31(e) (referring to a "special verdict" on certain issues in criminal forfeiture cases); Fed. R. Civ. P. 49 (regulating general verdicts and special verdicts in civil cases). The absence of a similar reference in the sentence

governing mitigating factors supports an interpretation of the statute that does not require the jury to return separate findings regarding mitigating circumstances.

That reading of the statute fully comports with the Constitution and, in fact, reflects congressional efforts to take care to avoid constitutional difficulties that had arisen under similar state statutes. An earlier version of the bill that became Section 848 provided in the provision analogous to Section 848(k) that the jury should "return special findings identifying any mitigating factors, and any aggravating factors * * * found to exist," and required that those findings "be made by unanimous vote." 134 Cong. Rec. 11,044 (1988) (subsection (k) of Amendment No. 2070, to S. 2355, 100th Cong., 2d Sess. (1988)).[17] Two days after this Court held in *Mills* v. *Maryland*, 486 U.S. 367 (1988), that the Eighth and Fourteenth Amendments barred States from requiring mitigating factors in capital sentencing hearings to be found unanimously, Senator D'Amato, the floor manager and principal sponsor of the proposed bill, called for an amendment of that provision to bring it into compliance with the Court's decision in *Mills*, to which he referred by name. 134 Cong. Rec. 13,748 (1988). The following day the Senate agreed to an amendment that produced the language in the current version of Section 848(k) by deleting the language requiring that the jury return special findings identifying mitigating factors, and adding in its place the provision that each juror individually may find and consider a mitigating factor without any requirement of jury unanimity. 134 Cong. Rec. 14,103-14,104 (1988) (Amendment No. 2343, to S. 2455, 100th Cong., 2d Sess. (1988)). That history, together with the decision in *Mills* to which it responds, strongly supports the interpretation articulated above.

[17] That amendment subsequently was withdrawn from S. 2355 and submitted by Senator D'Amato as the freestanding bill (S. 2455, 100th Cong., 2d Sess. (1988)) that ultimately became Section 848. See 134 Cong. Rec. 12,862-12,863 (1988).

ii. Petitioner's contrary interpretation of the statute rests almost entirely (see, *e.g.*, Pet. 16) on the provisions governing appellate review in Section 848(q). Those provisions indicate that the court of appeals "shall affirm" a death sentence if it determines that "the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section." Section 848(q)(3)(B). Because that provision deals only indirectly with the jury's obligations, it offers a slender reed for an interpretation that ignores the strong textual indicators offered by Section 848(k), the provision that deals directly with the jury's obligations.[18]

Moreover, because the appellate review provision makes perfect sense without interpreting it to override the clear indications of the text of Section 848(k), there is no reason to force a strained construction of Section 848(k). As the court of appeals explained (Pet. App. A16), Section 848(q)(3) does not by its terms "mandate the written findings of mitigating factors," but "require[s] only that [appellate courts] review any findings which are returned to ensure that the information presented during sentencing supports those findings." Finally, our view of the statute does not render superfluous the reference in Section 848(q) to mitigating factors, because even if jurors are not required to return findings regarding mitigating factors, it seems likely that a district court sitting as the sentencer would make such findings. In those cases, Section 848(q) would require the court of appeals to review those findings in the course of its review of the sentence of death.

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[18] The portion of Section 848(q) on which petitioner relies appeared in substantially identical form in the predecessor bill, which expressly required the jury to return findings regarding mitigating factors (134 Cong. Rec. 11,045 (1988) (subsection (q)(3)(B) of Amendment No. 2070, to S. 2355, 100th Cong., 2d Sess. (1988))), but was not amended when Congress removed the express obligation to return mitigating factors.

iii. Whatever the correct interpretation of Section 848's provisions regarding findings of mitigating factors, this case does not provide a suitable occasion for consideration of that question. Because petitioner did not raise this objection with the district court,[19] the question would directly affect his sentence only if the error satisfied the exacting plain-error standard established by Fed. R. Crim. P. 52(b).[20] Furthermore, as the court of appeals explained (Pet. App. A17), it is particularly unlikely that the lack of special findings on mitigating factors had any impact on the court of appeals' ability to review the propriety of the death sentence in this case. Given the lack of serious dispute about the factual basis for the mitigating factors to which the parties stipulated, there is no substantial reason to believe that the basis for the death sentence was the jury's failure to find appropriate mitigating factors; it is much more likely that the jury's decision reflected a reasoned moral response to the circumstances of a defendant who offered to pay for the murder of an individual in retaliation for the individual's cooperation with law enforcement authorities.

4. Petitioner next claims (Pet. 24-26) that Section 848 does not adequately narrow the class of offenders eligible for the death penalty because the necessary aggravating factor listed in Section 848(n)(1)(c)—that the defendant "intentionally engaged in conduct intending that the

[19] We disagree with petitioner's suggestion (Pet. 22 & n.22) that he adequately preserved the question in the trial court. Nothing in petitioner's explanation responds to the court of appeals' point that petitioner never asked that the jury be instructed to return written findings of mitigating factors, and never objected to the lack of such an instruction.

[20] Petitioner contends (Pet. 21-23) that the standard established by Fed. R. Crim. P. 52(b) does not apply to capital proceedings under Section 848 because of the review provisions set forth in Section 848(q). Those provisions do not, however, differ in any relevant way from the general provisions for criminal appeals set forth in 18 U.S.C. 3742(f), as to which Fed. R. Crim. P. 52(b) indisputably applies.

victim be killed"—duplicated an essential element of the offense of intentional murder under Section 848(e).

a. The court of appeals rejected that argument (Pet. App. A26-A28), explaining that this Court's decision in *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), indicated that a death penalty statute is constitutional if it "narrows the class of death eligible defendants at the guilt phase and at sentencing allows for the consideration of mitigating circumstances and the exercise of discretion." Pet. App. A27 n.4. Because Section 848 satisfies that test, the court of appeals concluded that it is constitutional. Pet. App. A27-A28.

b. This Court's decision in *Lowenfield* answers petitioner's claim. In *Lowenfield*, the Court stated that the "narrowing function required for a regime of capital punishment may be provided [by a statute that] * * * narrow[s] the definition of capital offenses, as Texas and Louisiana have done." 484 U.S. at 246. Because the Louisiana statute at issue in *Lowenfield*—like the federal statute—limits the class of death-eligible defendants only by requiring the State to establish intentional murder, together with another aggravating circumstance (such as procuring commission of the murder by the payment of money), *Lowenfield* makes it clear that the federal statute adequately narrows the class of death-eligible defendants. Compare *id.* at 242 (referring to Louisiana statute that authorizes death penalty on proof of intentional murder if the defendant "has offered * * * anything of value for the killing"), with Section 848(n)(1)(C) and (6) (death penalty authorized if defendant "intentionally engaged in conduct intending that the victim be killed" and "procured the commission of the offense by * * * promise of payment").[21]

[21] Petitioner's suggestion (Pet. 24) that the conviction in this case somehow tests the lower limits of the Eighth Amendment's *mens rea* requirement is unfounded. The jury's finding that petitioner "intentionally engaged in conduct intending that the victim be killed," Section 848(n)(1)(C), reflects a mental state considerably more culpable

Petitioner's reliance (Pet. 25-26) on *Stringer* v. *Black*, 112 S. Ct. 1130 (1992), is misplaced. *Stringer*, like its predecessors *Godfrey* v. *Georgia*, 446 U.S. 420 (1980); *Maynard* v. *Cartwright*, 486 U.S. 356 (1988); and *Clemons* v. *Mississippi*, 494 U.S. 738 (1990), involved the question whether a statutory aggravating factor was so vague as to invite arbitrary application of the death penalty in violation of the Eighth Amendment. Petitioner cannot plausibly claim that the aggravating factors at issue in this case run afoul of *Godfrey* and its progeny. Rather, this case involves the distinct question whether the aggravating factors that the statute articulates adequately narrow the class of death-eligible defendants. As explained above, *Lowenfield* answers that question in the affirmative.[22]

5. Petitioner next contends (Pet. 26-30) that his murder conviction should be overturned because the indictment and the jury instructions did not adequately allege a connection between the murder and petitioner's continuing criminal enterprise.

a. The court of appeals rejected that claim. Pet. App. A34-A37. The court concluded that the indictment was sufficient because it "track[ed] the language of the statute as written by Congress," and made "it clear that the government was charging [petitioner] with a murder in connection with, and not just contemporaneous to, the

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than the mental state found adequate in *Tison* v. *Arizona*, 481 U.S. 137, 152 (1987), "reckless indifference to the value of human life."

[22] Petitioner errs in asserting (Pet. 25) that *Stringer* renders *Lowenfield* "expressly inapplicable" to statutes that require jurors to weigh aggravating factors against mitigating factors. The Court in *Stringer* discussed *Lowenfield* only to make it clear that *Lowenfield*'s holding that the Court's "precedents do not require the use of aggravating factors" (because the State can implement narrowing at the guilt phase instead) does not affect the holding of *Godfrey*, under which the Court's decisions "have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content." *Stringer*, 112 S. Ct. at 1139.

ongoing continuing criminal enterprise." *Id.* at A36.[23] With respect to the jury instructions, the court noted that petitioner neither requested a jury instruction on that point nor objected to the instructions offered by the trial court, and accordingly reviewed the claim for plain error. The court concluded that the "clear and direct expression" of the jury instructions indicated "that there must be a connection between the murder and the continuing criminal enterprise." *Id.* at A37.

b. Because the government and petitioner agree that the court of appeals correctly held that the statute requires that the murder be connected to the continuing criminal enterprise, the only question is whether the indictment[24] and the instructions adequately set forth the meaning of the statute. For substantially the reasons set forth by the court of appeals, we believe that petitioner's criticisms are unfounded.

i. As this Court explained in *Hamling* v. *United States*, 418 U.S. 87, 117 (1974), "[i]t is generally sufficient that an indictment set forth the offense in the words of the statute itself." Section 848(e)(1)(A) imposes criminal liability on "any person engaging in or working in furtherance of a continuing criminal enterprise, * * * who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results." Count 3 of the indictment mirrored that language, modifying it slightly in a way that made it clear that the crime was committed in furtherance of the continuing criminal enterprise. See Pet. App. A35 (indictment alleged that petitioner, "while engaged in and working in furtherance of a continuing criminal enterprise, intentionally killed and counseled, commanded,

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[23] The superseding indictment on which petitioner was tried appears at 1 R. Item 115.

[24] Because petitioner did not challenge the indictment before trial on the basis he now raises (see 1 R. Items 180, 195 (petitioner's objections to the indictment)), his ability to challenge the indictment is circumscribed considerably by Fed. R. Crim. P. 12(b)(1).

induced, procured and caused the intentional killing of Martin Shuler"). Furthermore, to the extent that language left any doubt that the murder was committed "in furtherance of" the continuing criminal enterprise, the indictment as a whole, as the court of appeals explained (*id.* at A36), "makes it clear that the government was charging [petitioner] with a murder in connection with, and not just contemporaneous to, the ongoing continuing criminal enterprise." Petitioner's challenge to the indictment does not warrant review by this Court.

ii. Petitioner's objection to the jury instructions fails for similar reasons. First, because he failed to raise his objection in the trial court,[25] he can prevail only if the defect constituted plain error cognizable under Fed. R. Crim. P. 52(b). The instructions as a whole, however, advised the jury of the requirement that the murder be connected to the continuing criminal enterprise. The instructions on the murder count advised the jury that the murder charge was "built upon" the continuing criminal enterprise charge, and required a finding that petitioner procured the murder "while engaged in and working in furtherance of a Continuing Criminal Enterprise." Apr. 1, 1991, Tr. [13 R.] 186. Petitioner's disagreement with the court of appeals' understanding of the instructions that his trial counsel accepted does not warrant review by this Court.

6. Finally, petitioner contends (Pet. 30) that the district judge evidenced excessive bias when he stated in ruling on a pretrial motion that "Jarrell was an alcoholic lackey for [petitioner] who for $500, or maybe simply a fifth of liquor, likely would have done anything [petitioner] directed him to do." Order (Mar. 4, 1991), 1 R. Item 201, at 3.

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[25] Petitioner's requested instructions appear at 2 R. Item 217. His objections to the instructions given by the judge appear at Apr. 1, 1991, Tr. [13 R.] 61-64, 66-76, 84, 205-208. Petitioner does not contest the court of appeals' conclusion that he failed to raise that point in the district court.

a. The court of appeals rejected that argument, explaining that under applicable circuit precedent "a judge's rulings in a related case may not * * * serve as the basis for recusal," except "when the movant demonstrates pervasive bias and prejudice." Pet. App. A50. The court of appeals concluded that petitioner's criticisms of the district court "fail to demonstrate pervasive bias and prejudice." *Ibid.*

b. In light of this Court's recent decision in *Liteky* v. *United States*, 114 S. Ct. 1147 (1994), petitioner's claim is meritless. As the Court explained in *Liteky*,

> opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

*Id.* at 1157. Petitioner does not suggest that the district judge's views of the relative culpability of petitioner and Jarrell were based on anything other than the record and proceedings in this case, and the comments he identifies do not establish the type of "deep-seated and unequivocal antagonism that would render fair judgment impossible," *id.* at 1158. Accordingly, the court of appeals correctly rejected petitioner's challenge to the district judge's denial of petitioner's motion for recusal.

## CONCLUSION

With respect to the first question presented, the petition should be held for *Simmons* v. *South Carolina*, No. 92-9059 (argued Jan. 18, 1994), and disposed of in accordance with the Court's decision in that case. In all other respects, the petition should be denied.

Respectfully submitted.

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No. 93-1033

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October Term, 1993

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*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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The Government recognizes that this case presents constitutional issues in common with *Simmons v. South Carolina*, No. 92-9059 (argued Jan. 18, 1994) but argues that certiorari should be denied on the other Questions Presented. Its arguments fall into two categories.

First, rather than defending the published opinion of the Eleventh Circuit, the Government argues that the Court of Appeals should not have addressed the merits of some of the issues it did, in fact, decide. For example, the Government virtually concedes that the Eleventh Circuit misconstrued the federal death-penalty statute in holding that it does not require a comparative judgment between death and lesser sentences (Br. 13-15), but argues that Mr. Chandler waived this issue in the

District Court. The Government's waiver argument is wrong,[1] but that is the least of its faults. What the Government is asking this Court to do is (1) to uphold Mr. Chandler's death sentence on fact-specific grounds unresolved by any court below and unaddressed on the merits by this Court, and (2) to let the Court of Appeals' legally incorrect statutory interpretation stand as the leading precedent governing vitally important aspects of the federal capital sentencing process. This is indefensible.

Second, the Government argues that the Eleventh Circuit's rulings regarding other significant aspects of federal capital sentencing procedure should not be reviewed on the merits because they are correct on the merits. Aside from their discussion of the fourth question, which misconstrues petitioner's argument,[2] the Government's elaborate substantive reasoning

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[1] While trial counsel originally agreed to modify the initially proposed instruction, as the Government correctly notes, this was to avoid misinforming the jury that it had the power to actually *recommend* an alternative sentence. The record is clear that trial counsel was only objecting to the confusing phraseology of that particular instruction and that he clearly wanted an instruction that *informed* the jury of the alternative sentence. (RXIV-57-58)

Later, as the Government recounts, the court did not give trial counsel the opportunity to object to the failure to give the proper instruction but, instead, granted defense counsel an objection extending, not only to any failures to give a proposed instruction, but also to any "appropriate ground" for objecting. (RXV-93-94) The Government made the same waiver argument below and neither District Court, which was in the best position to consider it, nor the Court of Appeals, accepted it. *See* Pet. App. A66-A69, A12-A14.

[2] Petitioner's attack on the 21 U.S.C. § 848(n)(1)(C) aggravating factor is not based, as the Government suggests, on the fact that this factor duplicates an element of the underlying homicide offense. (Br. 26) Rather, petitioner's claim is that § 848(n)(1) improperly designates, *as an "aggravating" factor weighing in favor of death*, the necessary threshold finding that the defendant meets the minimum intent requirements of the eighth amendment. *See Tison v. Arizona*, 481 U.S. 137 (1987). Since the (n)(1) intent/recklessness factors necessarily "appl[y] to every defendant eligible for the death penalty", they are constitutionally infirm. *Arave v. Creech*, ___ U.S. ___, 113 S. Ct. 1534, 1542 (1993). The presence of such an over-inclusive aggravating factor in a weighing statute such as § 848 invalidates the death penalty despite the relative narrowness of the underlying homicide offense, *Stringer v. Black*, ___ U.S. ___,

plainly demonstrates that the issues are complex and controversial. That is all the more reason why this Court should decide them after full briefing and oral argument.

For the reasons stated in Mr. Chandler's Petition, and not answered by the Government, certiorari should be granted on all points raised.

April 20, 1994

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112 S. Ct. 1130, 1138-39 (1992), and the issue warrants review by this Court.